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ESPINASSE'S REPORTS

AT

NISI PRIUS.

VOL. III.

G. Auld, Printer,
Greville-Street, Hatton-Garden.

REPORTS

OF

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN THE

COURTS OF KING'S BENCH

AND

COMMON PLEAS,

From EASTER TERM 39 GEORGE III. 1799,
To HILARY TERM 41 GEORGE III. 1801.

By ISAAC 'ESPINASSE,
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

VOL. III.

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CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

KING'S BENCH,

EASTER TERM, 39 GEO. III.

SITTINGS AFTER TERM AT WESTMINSTER.

STONE *v.* CARR.

May 9th.

THIS was an action of aſſumpſit, brought by the Plaintiff, who was a ſchoolmaſter, for the education and maintenance of an infant child.

Though a huſband is not bound to provide for the children of his wife by a former huſband, yet if he takes them into his houſe, and they become part of his family, he ſhall be deemed to ſtand *loco parentis*, and be liable in a contract made by his wife for their education.

The child was the ſon of the Defendant's wife, by a former huſband. On the Defendant's marriage with the child's mother, he had taken poſſeſſion of an houſe, which ſhe occupied with her children, and which houſe had belonged to the firſt huſband: the buſineſs ſhe had carried on was continued, and the children were ſuffered to live with him as part of the family, and provided for by him while he was at home.

For the Defendant it was given in evidence,—that he was gunner of an India ſhip; that during his abſence on a voyage, the boy had been put out to ſchool by his mother to the Plaintiff. His counſel then contended, that as he had never made any contract or agreement with the Plaintiff, he could not be charged, by reaſon of any implied liability; and cited the caſe of *Tubb* v. *Harriſon*, 4 Term Rep. 118; wherein it is expreſsly decided, that a huſband is not liable for the education or maintenance of a child his wife may have had by a former huſband.

Lord *Kenyon*, after referring to the caſe cited, ſaid, the preſent was diſtinguiſhable from that: there was no doubt, if a man married a woman having children by a former huſband, he might refuſe to provide for them; and under the authority of the *King* v. *Munden**, cited in that caſe of *Tubb* v. *Harriſon*, he could not be compelled to do it; but if a man did not ſo refuſe to entertain them, and took the children into his family, he then ſtood *loco parentis* as to them. Such was the caſe here: he had ſo adopted them, and having gone abroad, and left them in the care of his wife, he ſhould hold him to be bound by her contracts made for their maintenance and education. If ſhe had any property by her firſt huſband, the caſe was ſtronger; for then part of the property, of which the Defendant poſſeſſed himſelf, belonged to

* Rex *v.* Munden—1 Stra. 190.

This was an order on the Defendant to provide for his wife's mother; and by the opinion of the Court of King's Bench, the order was quaſhed. The ſtatute which enables an order of maintenance to be made to provide for relations, extending to *natural relations only.*

the

the children: but even had their father died inſolvent, it would not alter his opinion. The Defendant, on his marriage, had no right to take poſſeſſion of the houſe and buſineſs: he had thereby confounded all the boundaries of the property, and placed himſelf in a ſtate of reſponſibility. He therefore directed the Jury to find a verdict for the Plaintiff; which they did.

Erſkine and *Lawes* for the Plaintiff.

Gibbs and *Eſpinaſſe* for the Defendant.

ALFRED *v.* MARQUIS of FITZJAMES.

ASSUMPSIT for ſervants wages.
Plea, *Non-aſſumpſit.*

A ſervant who comes over from the Weſt Indies, where he has been a ſlave, and who continues in the ſervice of his maſter in England, without expreſs promiſe, any agreement for wages, is not entitled to any, unleſs there has been an

The Plaintiff proved his employment as a ſervant in the family of the Defendant, and relied on a *quantum meruit* for the time he had ſerved.

It appeared in evidence, that the Plaintiff came over from *Martinique* with the Ducheſs of *Fitzjames*, then Mademoiſelle *Le Brun*. His father and mother had been ſlaves on an eſtate belonging to her in that iſland. He had entered into her ſervice in *Martinique*, and continued to ſerve her after her marriage; and the Duke found him with neceſſaries of every deſcription. There was no contract for any hiring for wages; but a witneſs ſaid, that the Marquis had been heard to promiſe to pay him wages.

Lord KENYON asked Mr. *Erſkine*, counſel for the Defendant, if he objected to the demand *in toto*.

Mr. *Erſkine* ſaid, he did; that the contract was not a contract for any wages in *Martinique*; and had ſo continued in this country without any variation.

Lord KENYON ſaid, he was prepared to give a decided opinion: That up to the time of the promiſe to pay wages, which the witneſs had ſaid the Defendant had made, the Plaintiff had no title to recover, as there was no original contract of ſervice for wages.

Garrow and *Lawes* for the Plaintiff.

Erſkine for the Defendant.

MOISES *v.* THORNTON, M. D.

To prove a party a Doctor of Phyſic, purſuant to an averment in pleading to that effect, it is not of itſelf ſufficient evidence to produce a diploma, under the ſeal of the Univerſity of St. Andrew, in Scotland.

THIS was an action for ſlanderous words.

The declaration ſtated, "That the Plaintiff was a Phyſician, and had duly taken the degree of a Doctor of Phyſic;" and then averred, that the Defendant, ſpeaking of him as a phyſician, uſed theſe falſe and ſlanderous words: "*He is a Quack, and never had a diploma: if he produces one, it is a forgery.*"

In ſupport of the averment in the declaration, that the Plaintiff "was a phyſician, and had duly taken the degree of Doctor of Phyſic," the Plaintiff's counſel produced in evidence a diploma from the univerſity of *St. Andrew*, in *Scotland*, under a ſeal, which was ſtated to be the ſeal of that univerſity.

To

To eſtabliſh the validity of this inſtrument, the attorney for the Plaintiff was called. He proved that he had gone into *Scotland* for the purpoſe: he had been preſent at a corporate meeting of the members of the univerſity, the Rector and Profeſſors: they acknowledged to him, that the ſignatures ſigned to the diploma produced, were their reſpective hands-writing; and that it had been granted in full ſenate. He further proved, that each profeſſor ſigned a certificate in his preſence (agreeing with their hands-writing ſigned to the diploma) and which certificate was produced. But he admitted that he had no previous acquaintance with the univerſity, its conſtitution, or mode of conferring degrees, or any knowledge of the profeſſors, except as he had given in his evidence in chief.

Lord KENYON expreſſed a doubt, whether this evidence was ſufficient to ſupport the allegation in the declaration.

The Plaintiff's counſel contended, that public and corporate bodies could ſpeak only by their ſeal, which was the only authentic document of a public act: that the univerſity of *St. Andrew* was recognized as a univerſity by the act of union, and of courſe had a power to confer degrees, of which the only evidence was ſome public inſtrument under the univerſity-ſeal conferring ſuch degree; that the mere production of it ought therefore to be ſufficient; but that the evidence here carried the matter ſtill farther, by proving the admiſſion of thoſe by whom the corporate act was done, which placed its authenticity beyond a doubt.

For the Defendant it was inſiſted, that the allegation in the declaration ſhould be made out by ſtrict evidence; that it was not ſufficient to produce a diploma, unleſs the Plaintiff alſo ſhowed that the univerſity from which it had iſſued had power to grant it, and the perſons whoſe names were to the diploma were properly authorized, and the ſeal of a univerſity ſo conſtituted as to have the power of conferring degrees.

Lord KENYON. I cannot take the evidence as offered. The foundation of the whole is, that there has been a corporate act done. The moſt authentic evidence muſt be given in a court of juſtice; and you cannot ſtop ſhort of it. I take notice of a ſeal; I muſt know that this degree, or diploma, which purports to be a corporate act, muſt be conferred under the authenticity of a ſeal; which authentically delivers the judgment of the univerſity at the time. If this is offered in evidence as the original act of the univerſity, the Plaintiff ſhould prove that it is their original act, by producing the original book of the univerſity, or by proving that the ſeal is the ſeal of the univerſity. This ſhould be done by a perſon acquainted with the univerſity; not as it is done by a witneſs unacquainted with the univerſity, ignorant of its conſtitution, or even whether they have any power to confer degrees or not. But it is attempted to be made good by the certificate: that is not a copy of the original act, which, if compared with the original, might be evidence: it is a certificate that ſome corporate act was done; but it is no evidence of that corporate act,

act. The evidence offered does not therefore satisfy the allegation; and the Plaintiff muſt be nonſuited.

Erſkine, *Gibbs*, and *McIntoſh* for the Plaintiff.
Garrow and *Raine* for the Defendant.

In the next term the Plaintiff moved for a new trial, and obtained a rule; but the court of King's Bench agreed in opinion with Lord KENYON, and diſcharged the rule.

SMITH *v.* MACDONALD. May 18.

THIS was an action on the caſe, for malicious proſecution.

Plea of Not Guilty.

If a party is indicted for a felony, though he is acquitted without calling any witneſſes, he cannot maintain an action for a malicious proſecution, if his acquittal was the reſult of deliberation, and the evidence ſufficient to cauſe the jury to pauſe.

The caſe, as it appeared in evidence, was, that the Defendant had cauſed the Plaintiff to be taken up and committed to priſon for a capital felony; having charged him and two other perſons with having ſtolen his pocket-book; that the Plaintiff had been kept in priſon for three weeks; and had been indicted for the offence at the Old Bailey, and acquitted.

It appeared, that at the trial at the Old Bailey, after the evidence for the proſecution was finiſhed, the jury having deliberated for a ſhort time, acquitted the Plaintiff and one of the other priſoners indicted with him, without calling any witneſſes, or putting him on his defence; and that witneſſes had been called for the third, and he alſo was acquitted.

Upon this evidence Lord KENYON said, he was of opinion the Plaintiff ought to be nonsuited. This was an action for malicious prosecution, to which a probable cause was the the decisive answer. It was of importance that prosecutions for offences should not be discouraged, at the same time that the liberty of the subject should be protected. A person might be acquitted, though the prosecutor had the best grounds for the prosecution he had instituted, and the presumption of guilt was strong. That if the evidence offered to the jury at the trial of the indictment was sufficient to cause them to pause, he should hold it a probable cause.

The Plaintiff was nonsuited.

Mingay, *Knowlys*, and *Marryat* for the Plaintiff.

Erskine and *Garrow* for the Defendant.

EXALL *v.* PARTRIDGE, JONES, *& al.*

Where there are three joint lessees, and two of them assign their interest to the third, but the landlord has not consented to accept his sole liability, the goods of the Plaintiff being put on the premisses by the permission of such third lessee, and distrained by the landlord for rent, and he having paid it, the three lessees are liable to him for money paid to their use.

ASSUMPSIT for money paid, laid out, and expended, with the common money-counts.

Plea, *Non-assumpsit*.

The three Defendants in this case, were the joint lessees by deed, of certain premisses in *Mary-le-bone*, to a person of the name of *Walsh*, where they carried on the business of coach-painters. Two of the lessees assigned their interest to *Partridge*, their co-lessee. He was employed by *Exall* the Plaintiff, who was a coach-maker, and suffered him to

to put several of his carriages on the premiſſes. While they were there, the rent being in arrear to *Walſh*, he entered on the premiſſes to diſtrain, and took the carriages belonging to the Plaintiff, which he found on the premiſſes, as a diſtreſs. The Plaintiff paid the amount of the rent (35*l.*) to redeem his carriages, and now brought the preſent action to recover that ſum from the three Defendants, as money paid to their uſe.

The Plaintiff gave in evidence, the notice of the diſtreſs which was to the three Defendants, and a receipt for the rent in their name; and proved by *Walſh*, the landlord, that he had never conſented to the aſſignment made to *Partridge*, but continued ſtill to hold them all liable to him for the rent.

The Counſel for the Defendant contended, that the whole intereſt in the premiſſes being veſted in *Partridge*, and he only being liable for the rent, the money muſt be held to be paid to his uſe only: that as the goods of the Plaintiff were entruſted to *Partridge* only, he only was liable for their being returned; and as the money was paid to redeem the goods, and no reſponſibility was attached to two of the Defendants, they could be ſubject to no liability on account of them: that to call upon them therefore to repay this money, would be to make them debtors againſt their conſent, by a voluntary payment made by the Plaintiff.

It was anſwered by the Plaintiff's counſel, that though *Partridge* only was ultimately liable, that was by means of a private agreement between themſelves, to which the Plaintiff was not a party; but

at

at the time of the diſtreſs, they were all jointly liable to the landlord; the diſtreſs was made on them all jointly, the notice of diſtreſs was on them jointly, and they were jointly benefitted by the payment That it was not a voluntary payment, whereby the other two Defendants were made debtors, but a compulſory one, under the coercion of the diſtreſs, and to redeem the Plaintiff's goods, which had been wrongfully taken for the debt of the Defendants.

Lord KENYON was of opinion, that as the ſole poſſeſſion of the premiſſes was in *Partridge* only, at the time of the diſtreſs, which circumſtance was known to the Plaintiff, and he ſolely liable to the rent, by reaſon of the aſſignment of his co-leſſees to him, — the money paid could be deemed to have been paid to his uſe only, and not to that of the two other Defendants; and nonſuited the Plaintiff.

Garrow and *Eſpinaſſe* for the Plaintiff.

Erſkine for the Defendant.

Vid. 8. T. Rep. 309.

In the next term a new trial was moved for; when his Lordſhip changed his opinion, with which the reſt of the court concurred, and a new trial was granted.

SITTINGS

SITTINGS AFTER TERM AT GUILDHALL.

DEAN *v.* ALLALLEY.

What erections the outgoing tenant may carry away from the premiſſes.

THIS was an action of covenant.

The Defendant was leſſee of ſome premiſſes, under a leaſe from the Plaintiff. One of the covenants was, that the Defendant ſhould leave all the buildings which then were, or ſhould be erected on the premiſſes during the term, in repair, &c. The breach aſſigned was, that the Defendant took down and carried away two ſheds, which had been erected during the term on the premiſſes.

Defendant pleaded performance of the covenants, and iſſue on the breach, as above aſſigned.

The buildings in queſtion were two ſheds, called *Dutch Barns*, which had been erected by the Defendant during his term; and which, his counſel contended, he had by law a right to remove.

Lord KENYON. If a tenant will build upon premiſſes demiſed to him, a ſubſtantial addition to the houſe, or add to its magnificence, he muſt leave his additions, at the expiration of his term, for the benefit of his landlord: but the law will make the moſt favourable conſtruction for the tenant, where he has made neceſſary and uſeful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been held ſo in the caſe of cyder-mills, and in other

other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term.

Gibbs contended, that by the express words of the covenant, the tenant was to leave all erections made on the premisses at the end of the term.

Lord KENYON. I am aware of the full extent of that, and not quite sure that it concludes the question. It means, that the tenant shall leave all those buildings which are annexed to and become part of the reversionary estate.

Garrow and *Jervis* for the Plaintiff.

Gibbs for the Defendant.

Vide *Shaw* v. *Fitzherbert*, 1 *H. Black*, 258, ex parte Quincy, 1 *Atk.* 477.

DAWES *v.* PECK.

Where goods are sent pursuant to order by a carrier, as directed by the consignee, the property is so out of the consignor, that he can maintain no action against the carrier for the loss of them.

THIS was an action on the case, against the Defendant, who was a common carrier, to recover the value of two casks of gin.

A Mr. *Odey*, living at a place called *Hill Morton*, in *Warwickshire*, had ordered two casks of gin from the Plaintiff. The goods were sent pursuant to order, directed to Mr. *Odey*, *Hill-Morton*, near *Rugby*, *Warwickshire*, by *Peck*'s waggon. A witness for the Plaintiff proved the delivery of the casks at the place where the Defendant's waggon took in goods, and payment for the booking.

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The goods were regularly ſent by the waggon; but as it did not go through *Hill-Morton*, the caſks were left at a place called *Weſt-Haddon*, near *Hill-Morton*, on the direct road which the waggon travelled. They were not taken away within the time mentioned in the permit; in conſequence of which they were ſeized.

For this negligence in not delivering them, the preſent action was brought.

The defence relied on by the Defendant's counſel was, that the action was ill brought in the name of the Plaintiff, the conſignor; and that it ſhould have been in the name of Mr. *Odey*, in whom they contended the legal property of the goods was veſted.

To prove this, they produced a letter from the Plaintiff to *Odey*, after the ſeizure; in which he ſtated, that the caſks were ſent exactly conformable to his orders, and as directed, and concluding, "as the goods have been ſent conformable to your orders, and by the carrier you directed, I ſhall look to you for payment of the amount of the goods." —This letter was contended by the Defendant's counſel to be an admiſſion by him that there was no property whatever in the goods in him, and that of courſe he could not maintain any action for the loſs. That in point of law, where goods are ordered to be ſent by a particular carrier, a delivery to that carrier is a delivery to the conſignee, and veſts the propetty from that moment in him.

The Plaintiff's counſel contended, that the property was not ſo diveſted out of the conſignor, but that

that he might maintain an action for the loſs of the goods, and that it had been ſo decided.

Vid. Vayle, v. Bayle, Cowp. 294

Lord KENYON ſaid that he was of opinion, that the conſignor, by the delivery ſtated, had fixed the conſignee with the goods, and that no property reſided in him: that that diſabled him from bringing the action for the loſs of the goods, as it was clear, that that loſs muſt fall on *Odey* the conſignee, who might certainly maintain an action for them; and which, if he did bring, the Defendant could not avail himſelf of the recovery had againſt him in this action for his defence; ſo that he might be twice charged.

His Lordſhip therefore directed a nonſuit.

Garrow and *Yates* for the Plaintiff.

Erſkine and *Raine* for the Defendant.

In the next term the Plaintiff's counſel moved for a new trial, and relied on the caſes of *Davis* v. *James*, 5 *Burr.* 2680, 2. *Moor* v. *Wilſon*, 1 Term Rep. 659; wherein it had been held that the conſignor, as well as conſignee, might maintain this action. But the court concurred in opinion with Lord KENYON, that the nonſuit was right, and took the diſtinction, that in thoſe caſes the right of the conſignor to maintain this action, turned upon his having entered into a ſpecial contract with the carrier to pay him for the carriage of the goods.

WATSON *v.* MAIN.

TRESPASS, for breaking and entering the Plaintiff's dwelling-houſe, breaking open doors, and ſeizing goods, detaining them in Defendant's poſſeſſion, till the Plaintiff, in order to recover them, was forced and obliged to pay a large ſum of money.

In order to juſtify the landlord in ſeizing, within thirty days, goods removed off premiſſes, as a diſtreſs for rent, wherever found, under ſtat. 11 Geo. II. ch. 19. the removal muſt have taken place after the rent became due, and muſt have been ſecret.

The Defendant pleaded, 1ſt, the general iſſue; and 2dly, that the Plaintiff rented a houſe, and was tenant to the Defendant, at a yearly rent of 25*l.* payable quarterly: that a quarter's rent was due: that the Plaintiff fraudulently and clandeſtinely removed the goods in queſtion into the houſe mentioned in the declaration, in order to prevent the Defendant, as landlord, from diſtraining them. That the Defendant entered the houſe, in which, &c. the outer door being open, in order to make a diſtreſs on the goods ſo fraudulently removed, and becauſe the door in queſtion (the ſame being an inner door) was ſhut and faſtened, the Defendant broke it open, and ſeized the goods as for a diſtreſs for ſaid rent, *prout ei bene licuit, &c.*

Replication *de injuria ſua propria* traverſing the fraudulent removal.

Rejoinder taking iſſue on the traverſe.

It was proved, that the Defendant had been tenant to the Plaintiff of a houſe in *Exeter Place*, pariſh of *St. Luke, Cheſſea*: That a quarter's rent had become due at *Lady-Day*, 1799. On the 14th of *March*, before the rent became due, that the Plaintiff had removed his goods off the premiſſes, in order (as the Defendant

fendant contended) to prevent their being taken as a diſtreſs for rent; but it did not appear that it had been done ſecretly. The goods had been ſeized within thirty days after their removal; which the Defendant contended he had a right to do, under Stat. 11 Geo. II. chap. 19.

Eyre, Chief Juſtice, ſaid, that he was of opinion that the defence could not be ſupported: the ſtatute ſaid, that "in caſe any tenant or tenants, &c. of "any meſſuages, lands, &c. upon the demiſe, or "holding whereof any rent, is or ſhall be reſerved, "due, or made payable, ſhall fraudulently, or clan- "deſtinely convey away, or carry off from ſuch "premiſſes, his, her, or their goods or chattels, to "prevent the landlord, or leſſor, &c. from diſtrain- "ing the ſame for *arrears of rent* ſo reſerved, due, "or made payable, it ſhall and might be law- "ful, &c. within the ſpace of thirty days next after "ſuch conveying or carrying away, to take and "ſeize ſame, wherever found, as a diſtreſs for the "ſaid *arrears of rent*."

He was of opinion, and had before held, that under this clauſe of the ſtatute, *Goods removed before the rent actually became due, and was in arrear*, could not be ſeized for rent; the ſtatute only applying, in his opinion, to where the removal had taken place *after the rent* became due. He was alſo of opinion, that, in order to ſubject the goods to be taken, the removal ought to be ſecret and not open, and in the face of day, as in ſuch caſe, the removal could not be ſaid to be clandeſtine, within the meaning of the ſtatute. And it not being in evidence, in the preſent caſe, that the removal was

ſuch

ſuch, he thought the plea was not ſupported: and his Lordſhip therefore directed a verdict for the Plaintiff; which the jury accordingly found.

Le Blanc, Serj. and *Lawes* for the Plaintiff.

Marſhal, Serj. and *'Eſpinaſſe* for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

TRINITY TERM 39 GEO. III.

SITTINGS AFTER TERM AT WESTMINSTER.

WM. M'NAMARA and MARGARET, his Wife, *v.* FISHER.

Though the husband is abroad, has lived abroad for many years, and the wife has been paid weekly a sum for her subsistence; and though she has appeared as a *feme sole*, and has contracted as such; if the husband is living at the time of the action brought, no action can be maintained against the wife.

THIS was a writ of error from the Common Pleas. The Defendant having brought an action of *assumpsit* in the Common Pleas, for goods sold and delivered, against the Plaintiff *Margaret*, the wife of the other Plaintiff, *William*, she pleaded *Non-assumpsit*, and gave her coverture in evidence; which the Defendant had answered, by proving that the Plaintiff *William* had lived abroad in the *West Indies* for fourteen years, and that the goods were sold to her as a *feme-sole*; that the husband was still abroad; and that she received from Sir *Richard Neave* an annual allowance of a guinea a week, though not secured

cured by deed. Lord Chief Juſtice *Eyre*, before whom the cauſe was tried, being of opinion, that this created a perſonal reſponſibility in her, he directed the jury to find for the Plaintiff; which they did.

Upon this the preſent Defendant ſigned judgment, and the wife (the Defendant *Margaret*) was taken in execution. She brought a writ of error on this judgment, in her own name, and aſſigned coverture as error in fact. The Defendant pleaded *in nullo eſt erratum*. Upon the caſe being ſet down for argument in Eaſter Term laſt, the court, on the authority of a caſe in the Year Book, 14 *Ed.* III. cited by Mr. Juſtice *Lawrence*, that the huſband ought to be joined, quaſhed that writ of error.

In this term another writ of error was ſued out in the name of the huſband and wife, without his concurrence, and her coverture was aſſigned as error in fact, as before.

The Defendant pleaded, that the huſband lived ſeparate and apart from the wife by his own deſire; and that the *feme* had a ſeparate maintenance duly paid to her.

The Plaintiffs in error took iſſue on this fact; and it now ſtood for trial before Lord KENYON.

The ſame facts were proved as at the former trial.

Lord KENYON. I think theſe parties have miſtaken their way very much, by coming into this court. I have frequently heard it laid down on the other ſide of the hall, and that from very high authority, that the proper courſe in ſuch a caſe is to file a bill againſt a married woman and her truſtees in a court of equity; and I remember a cauſe ſtanding over,

becauſe that was not done. Here there are no articles of ſeparation: to ſay, therefore, on this evidence, that there is an end put to the conjugal relation between thoſe parties, is what I dare not ſay, in point of law or of conſcience. I am pretty ſure, that Lord Chancellor *Elleſmere* has ſaid ſomething in *Belknap*'s caſe (if I recollect right, this caſe is to be found in Co. Litt. 29) which has laid down the law in that caſe, it is an old caſe, and of great authority, to ſhew that this kind of proceeding cannot take place. There is no evidence here to ſhew that this woman has a ſeparate maintenance. On this evidence, every man's wife may be ſaid to have a ſeparate maintenance, becauſe her huſband, as far as his abilities go, ſupplies her with money from time to time. There muſt be a verdict for the Plaintiff.

Erſkine and *Barrow* for the Plaintiff.

Garrow and *Henderſon* for the Defendant*.

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* When the above caſe was decided, the caſe of *Rutton* v. *Marſhall* was at hearing in the Exchequer Chamber. In that caſe, the former caſes, in which a *feme covert* had been held to be ſolely liable, on the ground of her having a ſeparate maintenance, were fully conſidered, and the law as there held overruled; and by the judgment of the court it was decided, That a *feme covert* cannot contract and be ſued as a *feme ſole*, even though ſhe be living apart from her huſband, and though ſhe has a ſeparate maintenance ſecured to her by deed.——*Marſhall* v. *Mary Rutton*, 8 Tem. Rep. 545.

REX *v.* WALTER.

THIS was a criminal information againſt the Defendant, as the proprietor of a newſpaper, called the *Times*, for a libel on the late Lord *Cowper*.

The proſecutor clearly proved the Defendant to be the proprietor of the paper, as well as the falſehood of the paragraph which reſpected Lord *Cowper*.

The Defendant gave in evidence, that though he was in fact the proprietor of the paper, he had nothing do with the conducting of it; that he reſided entirely in the country; that his ſon was concerned in the conducting of the paper, without any interference on his part; which facts were proved by the ſon himſelf.

The proprietor of a newſpaper is anſwerable criminally, as well as civilly, for miſconduct in the conducting of the paper, as *ex. gr.* for the publication of a libel, though he has nothing to do with the publication, and the whole is conducted by his ſervants.

Erſkine, for the Defendant, contended, that though the Defendant might have been liable in a civil action for all acts of his agents, it was otherwiſe where he was to anſwer criminally. That though the proving him to be the proprietor of the paper might, *prima facie*, ſubject him criminally, it was otherwiſe where it was clearly ſhewn that the fact of the publication was not his, nor done with his privity; that *actus non facit reum niſi ſit mens rea*, ſo that if the act of publication, which conſtituted the crime, was proved to be that of another, the jury would be bound to acquit the Defendant.

Lord KENYON ſaid, he was clearly of opinion, that the proprietor of a newſpaper was anſwerable criminally, as well as civilly, for the acts of his ſervants or agents, for miſconduct in the conducting of

a newſpaper. That this was not his opinion only, but that of Lord *Hale*, Juſtice *Powell*, and Mr. Juſtice *Foſter*; all high law authorities, and to which he ſubſcribed. This was the old and received law for above a century; and was not to be broken in upon by any new doctrine upon libels.

The Defendant was found guilty.

Law, *Adam*, and *Cowper* for the proſecution.

Erſkine for the Defendant.

CUTHBERT *et alt. v.* HALEY.

If a party who is liable on bills of exchange or other ſecurity, on which uſurious intereſt has been taken, on being called upon for payment of the bills or ſecurities by a *bona fide* holder, agrees to give a bond for the amount of theſe bills, it is a good and legal ſecurity, and the obligee cannot ſet up the uſury in the bills as a defence to the bond. *Aliter* of a *particeps criminis*, who holds bills or notes uſuriouſly taken; he cannot by the ſubſtitution of another ſecurity recover the amount of the bills or notes.

DEBT on bond.

The Defendant pleaded, that the bond was given by the Defendant for ſecuring money, lent by one *Planck*, to him; upon which loan it was corruptly, and againſt the form of the ſtatute, agreed, that the Defendant ſhould pay for the forbearance above five per cent. &c.

The Plaintiffs replied, that the bond was given for a good and lawful debt, and traverſed the uſury and iſſue thereon.

The Plaintiffs were bankers. *Planck* was a gold-beater in Long Acre, and kept caſh at the houſe of the Plaintiffs.—*Planck* was largely concerned in diſcounting bills of exchange, and had diſcounted for the Defendant bills to the amount of £.1344 2*s*. upon which he took uſurious intereſt.

Planck, in the uſual courſe of buſineſs, paid thoſe bills into his banker's, (the Plaintiffs) who credited him

him to their amount, and who had no manner of knowledge of his tranſactions with the Defendant.

When the bills became payable, payment was demanded of the Defendant; who not being then able to pay them, the Plaintiffs took his bond for £.1340, and paid them the difference in caſh.

Theſe facts being diſcloſed at the trial, the Plaintiffs counſel contended, that they did not amount to uſury.

For the Defendant it was inſiſted, that the notes having been obtained from the Defendant on a uſurious tranſaction, and the bond given in conſideration of the notes, that the illegality of the notes was communicated to the bond, and vitiated it in point of law; and *Tate* v. *Wellings*, 3 T. Rep. 537, was relied on.

Lord KENYON ſaid, that whatever might have been the caſe between the Defendant and *Planck*, had the bond been given to *Planck*; and however the illegality of the conſideration might in ſuch caſe have vitiated the bond, he was clearly of opinion that it could not have that effect here. It was admitted, that the Plaintiffs were not concerned in or conuſant of the dealings between the Defendant and *Planck*; they gave the value of theſe notes to *Planck*, and the bond was given to ſecure that value by the Defendant, whoſe notes they were. It would be of very ſerious conſequences, if ſecurities given at a great length of time preceding, on a good conſideration, ſhould be declared void, by reaſon of ſome part of the conſideration being tainted with uſury, between perſons not parties in the ſecurities. If a party in poſſeſſion

of a ſecurity uſuriouſly obtained, prevailed on that party to ſubſtitute a different ſecurity, that ſhould not make the latter good, becauſe the ſubſtitution was made to one who was party to the uſury; but in this caſe, the ſecurity was given to one not a *particeps criminis*, but to one who came fairly by the notes, and gave for them a good conſideration. He was therefore of opinion the Plaintiff was entitled to recover.

Verdict for the Plaintiff.

Erſkine, *Gibbs*, and *Reader* for the Plaintiff.

Mingay, *Marryatt*, and *Lawes* for the Defendant.

In the next term, the Defendant's Counſel, with the conſent of the Lord Chief Juſtice, took the opinion of the court on the point; and the reſt of the Judges unanimouſly agreed with Lord KENYON, and gave judgment for the Plaintiff.

Vide *Ellis* v. *Warnes*. *Moor*, 752, and Cro. Car. 33. 5 C. *Roberts* v. *Tremayne*, Cro. Jac. 508, and *Lowe* v. *Waller*, Doug. 736.

SITTINGS AFTER TERM AT GUILDHALL.

RAVEN *et alt.* *v.* DUNNING *et* CHILTON.

June 28th.

THIS was an action on the caſe, on a ſpecial agreement.

Where one of the Defendants in a joint action pleads bankruptcy, that does not make him admiſſible as a witneſs.

The declaration ſtated, "That in conſideration that the Plaintiff would ſhip and deliver to certain perſons, carrying on trade by the name of *Sherraton* and *Chilton*, twelve puncheons of rum, the Defendants undertook to re-deliver value, &c. and breach aſſigned in not delivering, &c.

Dunning the Defendant, pleaded *Non-aſſumpſit.*

Chilton the other Defendant, pleaded *Bankruptcy.*

The queſtion in the caſe was, Whether the goods for which the action was brought, had been ſold and delivered to *Sherraton* only, or to *Sherraton* and *Chilton*, who carried on the buſineſs jointly, of ſpirit-merchants at *Sunderland?*

To prove that the goods had been ſold to *Sherraton* only, *Law*, for the Defendant, propoſed to call *Chilton*, one of the Defendants on the record.

His admiſſibility was oppoſed by the Plaintiff's counſel.

Law contended, that he having pleaded bankruptcy, was entitled to his diſcharge from the preſent demand,

demand, by virtue of his certificate, and was therefore unintereſted in the event of the action. He compared it to the caſe of an action of treſpaſs againſt ſeveral, where one of the Defendants, againſt whom the Plaintiff offered no evidence, might be called as a witneſs for the other Defendants. He added, that he had releaſes from the witneſs to the aſſignees, and from *Dunning*, the other Defendant, to him.

Erſkine, for the Plaintiff. The witneſs ſtands a Defendant on the record, and liable to the coſts of the action. It is contended, that he is a competent witneſs, becauſe he has obtained his certificate. Can the Plaintiffs be bound by the mere production of the certificate? It may be procured by fraud: it may be void, becauſe the bankrupt may have loſt money at play. In the caſe put of the Defendant in treſpaſs, who is admitted as a witneſs for the other Defendants, he is acquitted by the verdict of the jury: till then he is not admiſſible. In this caſe there is no acquittal by the verdict of a jury. The witneſs is therefore not admiſſible.

Lord KENYON. I adopt the anſwer given by Mr. *Erſkine*. This witneſs is not admiſſible, nor can he be made ſo by the mode propoſed. He is liable to the coſts of this action in caſe of a verdict for the Plaintiff; that is, an intereſt from whence he cannot be diſcharged.

His Lordſhip rejected him; and the Plaintiff had a verdict.

Erſkine, *Gibbs*, and *Park* for the Plaintiff.

Law and *Giles* for the Defendant.

Vide *Ward* v. *Hayden et Ventom*, ante. 552.

JAMES

JAMES *v.* JONES, *et alt.*

July 3.

CASE againſt the Defendants, as owners of a ſhip called the *Seaflower*, for not delivering goods ſhipped on board that veſſel by the Plaintiff.

It turned out, however, in evidence, that though the Defendants were the owners of the ſhip, ſhe had, in fact, been chartered for that voyage by them, to two perſons of the name of *Reed* and *Parkinſon*.

Upon this evidence, Lord KENYON nonſuited the Plaintiff, holding,—As no expreſs contract was proved with the Defendants, that *Reed* and *Parkinſon* were for that voyage to be deemed as the owners, and the Captain as their agent *pro hac vice*, the liability being ſhifted by the charter party from one party to the other.

Erſkine and *Park* for the Plaintiff.

Garrow and *Gibbs* for the Defendant.

END OF TRINITY TERM.

CASES

CASES

ARGUED AND RULED

ON THE

HOME CIRCUIT.

SUMMER ASSIZES, 1799.

AT HERTFORD,

CORAM MR. JUSTICE BULLER.

The KING *v.* KELLY, CROSBY, and BURKE.

Monday, July 9th.

In an indictment, charging the prisoner with uttering false coin, and with having other counterfeit money in his possession, the fact of uttering should be distinctly charged in the count for the latter offence, and not with reference to another count.

THIS was an indictment against three Defendants. The first count charged, that the Defendants made and counterfeited one piece of counterfeit money to the likeness of a shilling, and uttered the same to one *Mary Inglethorp*, &c. The second count was in terms the same, only charging the uttering to be to one *Watts*. The third count charged, that the Defendants when they so *uttered the said last mentioned piece of false and counterfeit money*, had about them, in their custody and possession, one other piece of false and counterfeit money, knowing the same to be false and counterfeit.

Upon this indictment being opened, *Buller*, Justice, ruled, That the prosecutor could go on the first or second counts of the indictment, for uttering only. That, in order to convict on the aggravated charge in the third count, it was necessary that the fact of uttering

uttering ſhould be diſtinctly charged in the ſame count in which it was charged, that the Defendants had other counterfeit money about them at the time; which in the preſent count was not the caſe, there being in it no diſtinct charge of uttering, but by reference to the precedent counts.

The jury found two of the priſoners guilty, and the verdict was taken on the ſecond count.

The Common Serjeant *Silveſter* and *Fielding*, for the proſecution *.

SUMMER ASSIZES, 1799, AT CHELMSFORD. CORAM MR. JUSTICE BULLER.

SCAMMELL, q. t. *v.* WILLETT, Clerk.

Wedneſday, July 9th.

DEBT on the Statute 21 *Hen.* VIII. ch. 13, for non-reſidence.

The Defendant was the rector of *Stanford le Hope*, in the county of *Eſſex*.

To debt againſt the incumbent of a pariſh for non-reſidence, it is a good defence that, from the unhealthfulneſs of the living, he cannot reſide there, but at the riſque of life.

The Plaintiff, after proving that fact, then gave in evidence, that for the twenty years laſt paſt, the Defendant had not reſided on his benefice.

The defence relied upon was, that the Defendant after having been preſented to the living, went to reſide there, and was ſoon after attacked with an ague; that the violence of the diſtemper had brought on a

* Though the point ruled in this caſe is not properly a Niſi Prius point, I have however thought it worth inſerting.

fever,

fever, which had totally deſtroyed his health. Theſe facts were proved; and it was further given in evidence, by his phyſician, that his preſent ſtate of health was ſuch, that to reſide on his living, would probably be attended with the moſt ſerious and dangerous conſequences.

This was relied on by the Defendant's counſel, as amounting to a good defence in point of law.

Shepherd, Serj. for the Plaintiff, admitted that ſickneſs, or want of health, was a ſufficient excuſe for a temporary abſence of the incumbent from his living; but for a temporary abſence only: that if his ſtate of health was ſuch as to incapacitate him totally from attending to the duties of his function, he ought to exchange his preferment, or totally retire from a ſituation, the important duties of which he was incapable of performing: and he ſaid, that a caſe to that effect had been ſo lately decided in the court of King's Bench.

Buller, Juſtice. I know of no law that ſays ſo; and I take the law to be preciſely the other way. Sickneſs is a ſufficient excuſe for a temporary abſence, and it is ſo held in *Coke*'s Reports; and there is no reaſon why it ſhould not be ſo, where the illneſs, or total want of health in the incumbent is ſuch, that he cannot reſide on his living but at the riſque of life. I am of opinion that it is a ſufficient excuſe; and as I know of no deciſion of the Court of King's Bench holding the contrary, I ſhall rule it ſo.

The Plaintiff was nonſuited.

Shepherd, Serj. and *R. Jackſon* for the Plaintiff.

Garrow for the Defendant.

Same

SAME ASSIZES.

MOYES *v.* WILLET, Clerk.

An action on the caſe, will not lie againſt the parſon for not taking away his tithes, unleſs they have been properly ſet out. It is therefore not maintainable for not taking away tithe of hay, where it was ſet out in the ſwath.

THIS was an action on the caſe, againſt the Defendant, as rector of the pariſh of *Stanford Le Hope*, in the County of *Eſſex*, for not taking away his tithes.

The Plaintiff was a farmer in that pariſh, of which the Defendant was the incumbent: and it was proved, that when the graſs was cut, he had ſet out the tithe in the ſwath.

Buller, Juſtice, ruled, That the Plaintiff could not recover: that before the Plaintiff could entitle himſelf to damages for not taking away the tithes, it ſhould appear that they were properly ſet out, and in a fit ſtate for the parſon to take them: that by a late determination of the Court of Exchequer, the tithe of hay was not to be ſet out in the ſwath, but in the cock; and that as the Plaintiff had not ſet out his tithe in a proper manner, the Parſon was not bound ſo to take it; and the action was therefore not maintainable.

The Plaintiff was nonſuited.

Shepherd, Serj. and *R. Jackſon* for the Plaintiff.

Garrow for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

MICHAELMAS TERM 40 GEO. III.

IN THE COMMON PLEAS,
FIRST SITTING IN TERM.

JOHNSON *v.* EVANS, Clerk.

No action is maintainable for words ſpoken by a party in giving charge of another to an officer, or in preferring a complaint before a magiſtrate.

THIS was an action of ſlander. The words were, "She is a thief, and tried to rob me of part of her wages."

The Defendant pleaded, 1ſt, Not Guilty; 2d, A juſtification of the truth of the words.

The Plaintiff had been ſervant to the Defendant. Upon a diſpute taking place, he diſcharged her; and ſome difference ariſing reſpecting the payment of her wages, he charged her with having attempted to cheat him reſpecting her wages, and uſed the words as laid; but the Plaintiff failed in proving them to have been ſpoken at that time.

Having however ſent for a conſtable, in order to take her into cuſtody, he made uſe of the ſame words

words to the conſtable when he came, to whom he meant to have given her in charge; but which in fact he did not do.

To prove the words, the Plaintiff's counſel then called the conſtable.

He proved the words ſpoken; but it further appeared, in the courſe of his evidence, that the words had been ſpoken by the Defendant, addreſſed to him in his character of conſtable, and in the courſe of the charge and complaint which the Defendant made to him againſt the Plaintiff.

Lord ELDON, Chief Juſtice, ſaid, that the evidence given of the ſpeaking of the words laid in the declaration, was not ſuch as he ſhould direct the jury to find a verdict for the Plaintiff. Words uſed in the courſe of legal or judicial proceeding, however hard they might bear on the party of whom they were uſed, were not ſuch as would ſupport an action for ſlander. In this caſe, they were ſpoken by the Defendant, under a belief of the fact, and when he was about to proceed legally to puniſh it. It would be a matter of public inconvenience, and operate to deter perſons from preferring their complaints againſt offenders, if words ſpoken in the courſe of their giving charge of them, or preferring their complaint, ſhould be deemed actionable.

The Plaintiff ſhould be called.

Cockell, Serj. and *Eſpinaſſe* for the Plaintiff.

Shepherd Serj. and *Lens*, Serj. for the Defendant.

SECOND SITTING AT WESTMINSTER, IN THE KING'S BENCH.

Nov. 14.

JACKSON *v.* BURLEIGH.

To maintain an action for maliciously holding, when less than 10*l.* was due, cannot be sustained, unless it is in proof that the Plaintiff knew the fact to be so. It is not sufficient that in the action less than 10*l.* was paid into court, which the Plaintiff took out and proceeded no farther in the action.

CASE for maliciously arresting the Plaintiff, and holding him to bail, without any cause of action, to the amount of 10*l.*

Plea,—Not guilty.

The Plaintiff's case, as stated by his counsel was, that the Plaintiff, who was a liquor-merchant at *Cambridge*, having employed the Defendant, who was a carrier, in the way of his business, and there being accounts depending between them, they had come to a settlement, on which a balance of 9*l.* 6*s.* only was in favour of the Defendant, who, notwithstanding, had arrested and held him to bail for 10*l.* and upwards. He further stated, in corroboration of the above facts, that the Defendant having proceeded in the action, in which he had arrested the Plaintiff, the latter paid 9*l.* 6*s.* into court; which the Defendant took out of court, and proceeded no further in the action.

In proving his case, the Plaintiff's counsel gave in evidence the affidavit to hold to bail; he then produced the writ, which was indorsed to hold to bail for 10*l.* and upwards, directed to the sheriff of *Cambridge*.

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The witneſs who produced the writ, was aſked where he had got it; he ſaid, it had been ſent up to him in a letter. *Law* objected to its being read.

Lord KENYON ſaid, that under ſuch circumſtances, it could not be received in evidence.

The Plaintiff's counſel then called the bailiff by whom the arreſt had been made; he produced his warrant from the ſheriff of *Cambridge*, under which the Plaintiff had been arreſted.

Lord KENYON then ſaid, he thought the writ might be given in evidence by producing it, the Plaintiff having proved an affidavit to hold to bail, and a warrant founded on the writ. It was accordingly received.

To prove that only the ſum of 9*l.* 6*s.* was due from the Plaintiff to the Defendant, a witneſs was called, who was preſent when the Plaintiff and Defendant ſettled their accounts. He ſaid, that upon that ſettlement the Plaintiff made up the account, by which he made out that he was then debtor to the Defendant on that balance of accounts, in 9*l.* 6*s.* only.

He was aſked, if the Defendant acquieſced in the account ſo ſtated, and admitted the balance to be ſo; he ſaid not: that the Defendant claimed a balance as due to him of 25*l.*

Lord KENYON ſaid, that the ground of the action failed, and that the Plaintiff ſhould be nonſuited. The complaint was for malicioufly holding him to bail, when ſuch a ſum of money was not due as entitled the Defendant by law to hold him to bail. If the Defendant acted under the impreſſion of a

miſtake, in believing more than 10*l.* to be due, and under that belief held him to bail, he had a probable cauſe, and was warranted in that proceeding; the Plaintiff felt the neceſſity of proving that the arreſt was made with full knowledge that the debt was under 10*l*, but he had failed in proving it. The calculation was not acquieſced in by the Defendant, who claimed a balance of 25*l.* and therefore might well ſuppoſe that more than 10*l.* was due.

The Plaintiff was nonſuited.

Erſkine and *Pell* for the Plaintiff.

Law and *Lawes* for the Defendant.

IN THE COMMON PLEAS, WESTMINSTER, THIRD SITTINGS IN TERM.

Nov. 21.

BERGSTROM *v.* MILLS.

If a ſhip is captured in the courſe of her voyage, and is afterwards recaptured and arrives at her port of deſtination, the ſailors are entitled to their wages.

ASSUMPSIT by the Plaintiff, for wages due to him as a ſailor on board the ſhip *Brazilla*, of which the Defendant was the owner.

Plea of *Non-aſſumpſit.*

The caſe on the part of the Plaintiff was this:—He was a native of *Sweden*, and engaged as a ſailor on board the *Brazilla*, a tranſport in the ſervice of government, bound to *Martinique*. In the courſe of the voyage, the veſſel was taken by a *French* privateer; ſhe was afterwards retaken by the *Alfred* man

man of war, and carried into *Martinique*, which was her port of deſtination, where ſhe diſcharged her cargo.

The defence was,—1ſt, That the voyage was not performed :—2dly, That after the Plaintiff, and the other ſeamen of the *Brazilla*, had been taken on board the privateer, they had been invited by the officer of the privateer to enter on board her, by an offer of prize-money, not merely of ſubſequent captures, but of the *Brazilla* herſelf; which offer had been accepted by the Plaintiff and another *Swede*, who was a mariner on board the *Brazilla*; and that they had entered and done duty on board the privateer, as part of her crew.

This was however denied by all the witneſſes called for the Plaintiff.

Lord ELDON. There is no doubt, that if a ſhip does not perform her voyage, the ſailors have no title to wages; the policy of the law has ſaid ſo, as the means of making it the intereſt of the ſailors to preſerve the ſhip; but it is equally certain, that if the voyage is performed, a temporary interruption ſhall not defeat the claims of the ſeamen. The firſt point made here is, that the voyage has not been performed. I am of opinion that it has been ſufficiently performed as to the ſervice, to entitle the Plaintiff to recover, unleſs he is prevented by the law ariſing out of the ſecond point made by the Defendant's counſel. It is in evidence, that the ſhip ultimately arrived at *Martinique*, the port of her deſtination; ſhe was on her arrival entitled to freight; freight is the mother of wages; ſalvage was due to the King's

ſhip by which ſhe was recaptured; but with that deduction ſhe was entitled to receive her freight; and probably has received it.

If a foreign ſeaman, captured on board an Engliſh ſhip, enters into the ſervice of the enemy, though the ſhip is afterwards recaptured and completes her voyage, he ſhall not be entitled to wages.

The ſecond point is a new one:—Whether a foreign ſeaman, captured on board an *Engliſh* ſhip, who is taken on board the enemy's ſhip, and voluntarily enters on board her, and becomes a part of her crew, thereby forfeits his claim to wages on board the *Engliſh* ſhip? The ſtrong inclination of my opinion upon that point is, that it is a forfeiture. Upon this point, however, there is contradictory evidence; that, the jury are to decide; and if they think the Plaintiff did enter on board the privateer, and ſerve as part of her crew, I recommend it to them to find for the Defendant, and to leave it to the Plaintiff to move for a new trial.

The jury found a verdict for the Plaintiff.

Cockell, Serjeant, and *'Eſpinaſſe* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

HABERSHON *v.* TROBY.

Dec. 3.

Where a cauſe has been referred, and the arbitrator, upon inſpection of the Plaintiff's own books, and examination of the parties, finds that the Plaintiff had no cauſe of action, in an action for malicious proſecution, the arbitrator cannot be called as a witneſs to prove thoſe facts.

CASE, for maliciouſly holding the Plaintiff to bail.

The circumſtances of the caſe were theſe:

The preſent Defendant, who was a ſilverſmith, had brought an action againſt the Plaintiff, who had been his ſervant, for money had and received, and had in that ſuit arreſted and held him to bail.

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The cauſe came on to be tried at the firſt ſitting in the preſent term, when the preſent Plaintiff offered to ſuffer a verdict to go againſt him, provided the preſent Defendant would produce his books before an arbitrator, and it did not appear by his own checks and entries, that the whole money for which he then ſued the Plaintiff, had not been accounted for. A verdict was accordingly taken by conſent for the Plaintiff (the preſent Defendant) and the cauſe referred, with power, for the arbitrator to examine the parties themſelves upon oath, and compel a production of the books referred to.

The arbitrator having examined the books, and the parties themſelves on oath, awarded in favour of the preſent Plaintiff, that there was no cauſe of action againſt him, and that nothing was due from him to the preſent Defendant.

Upon theſe circumſtances the preſent action was founded, and notice given to produce the books.

Erſkine for the Plaintiff, now called for the books, and propoſed to examine the arbitrator as to the facts which appeared before him.

This was oppoſed by the Defendant's counſel.

Per Lord KENYON. I don't think I ought to admit this evidence. It ſeems to me, that the arbitrator ought not to be permitted to depoſe here as to what tranſpired before him, either upon the examination of the parties themſelves, or on an inſpection of the Plaintiff's books; upon the principle, that the parties themſelves could not have been examined in the former cauſe, nor could the Plaintiff be compelled by a Judge at *Niſi Prius* to

produce his books; and it would be a dangerous thing if ſuch evidence were admitted to prove the arreſt in that cauſe to be malicious, as the arbitrator might have proceeded to cut the knot rather than to unlooſe it, according to the ſtrict rules of law, from a wiſh to do complete juſtice between the parties.

The parties conſented to withdraw *a juror*.

Erſkine, *Mingay*, *Barrow*, and *Robinſon* for the Plaintiff.

Garrow for the Defendant.

DAVIS *v.* TROTTER, Eſq. Sheriff of Surry.

Where a bankrupt has ſurrendered within the forty-two days under his commiſſion, and has ſubmitted to his laſt examination, the commiſſioners by their own authority may enlarge the time for completing his laſt examination, and he is protected thereby from arreſts during that interval.

THIS was an action againſt the Defendant, as ſheriff of *Surry*, for an eſcape.

The perſon for the eſcape of whom the action was brought, was a bankrupt; he had ſurrendered under his commiſſion at the end of the forty-two days; his laſt examination being not then concluded, the commiſſioners made an order for enlarging the time for his laſt examination till a further day, for which they gave him a ſummons, and indorſed it, as the order for his attendance on that day, and as his prote ion during the intervening time.

During that interval he was arreſted by an officer of the ſheriff of *Surry*, at the ſuit of the Plaintiff. He produced the ſummons from the commiſſioners for his enlarged time; and the officer on the production

tion of it diſcharged him. Upon that diſcharge the preſent action was founded, as being an eſcape.

Erſkine for the Plaintiff, contended, that the commiſſioners of bankrupt had no power to enlarge the time for a bankrupt to complete his examination, under the ſtatute 5 *Geo.* II. ch. 30, but were confined to the forty-two days mentioned in it; and that if further time was neceſſary, it muſt be done by application to the Lord Chancellor, and by procuring an order on petition for that purpoſe.

Lord KENYON ruled, that as the bankrupt had ſurrendered under his commiſſion, within the forty-two days appointed for his laſt examination, it was clearly in the power of the commiſſioners to enlarge the time for him to complete his examination, and in their power to protect him during that interval; but that had he never ſurrendered under his commiſſion, that then an enlargement of the time muſt be by order of the great ſeal. His Lordſhip, however, allowed the Plaintiff to take a verdict for one ſhilling, with liberty for the Defendant to move to ſet the nonſuit aſide.

Erſkine and *Lawes* for the Plaintiff.

Garrow and *Marryatt* for the Defendant.

In the next term, the Defendant's counſel moved accordingly, and relied on *Perrott*'s caſe, 2 Burr. as deciding the right of the commiſſioners to enlarge the time for the bankrupt's final examination.

The court concurred in opinion with Lord KENYON, and ordered a nonſuit to be entered.

SITTINGS.

SITTINGS AFTER TERM
IN THE COMMON PLEAS,
AT WESTMINSTER.

SUTHERLAND *v.* LISHNAN.

Where parties contract by deed, but the Defendant does not execute it, the Plaintiff may ſue in aſſumpſit, notwithſtanding the deed.

ASSUMPSIT for ſeamens wages.

The Plaintiff was mate of the ſhip of which the Defendant was the captain.

The Plaintiff proved the hiring by the Defendant of him, in the capacity of mate, and his ſervice during the voyage.

The Defendant's Counſel produced the ſhip's articles; theſe were under ſeal, and the Plaintiff had ſigned and ſealed them; but they were not executed by the Defendant. They contended, that the action was miſconceived, and ought to be covenant, the articles being under ſeal.

Lord ELDON ruled, that the binding by deed ought to be mutual, to make it neceſſary for the Plaintiff to ſue in covenant: that the Defendant never having ſealed the articles, could not be ſued in that form of action; and that the preſent action was not rightly brought.

The Defendant had a verdict.

Cockell, Serjeant, and *'Eſpinaſſe* for the Plaintiff.

Shepherd, Serjeant, and *Taddy* for the Defendant.

RODGERS

Dec. 6.

RODGERS *v.* LACY.

Where, under the act for regulating ſeamens wages in the Weſt India trade, a licence is obtained by the captain to give an advance of wages, the licence muſt ſpecify the amount of the wages permitted to be given.

THIS was an action of aſſumpſit by the Plaintiff, to recover his wages, as a ſailor on board the ſhip *Suffolk*, of which the Defendant was the captain.

The Plaintiff proved, that the Defendant's ſhip being at *Savannah la Mer*, in the iſland of *Jamaica*, and much in want of hands, had engaged the Plaintiff, and five others, at forty-five guineas bounty, and 9l. per month wages; that the Plaintiff ſerved during the voyage; that the Defendant paid him the forty-five guineas, but refuſed to pay him the monthly wages.

The Plaintiff's witneſſes further proved, that at the time the Defendant hired the Plaintiff and the other ſeamen, he ſaid, that he was enabled to give them ſuch large wages, as he had a licence under the act of parliament from Mr. *Murray*, who was *cuſtos rotulorum* at *Savannah la Mer*.

By the ſtat. 37 *Geo.* III. ch. 73, it is enacted, "That no maſter of any merchant ſhip, which ſhall "ſail from any port or place in *Great Britain*, ſhall "hire, or engage to ſerve, any ſeaman or mariner, "in any of his Majeſty's colonies in the *Weſt Indies*, "at or for greater or more wages than according to "the rate of double the monthly wages contracted "for with ſeamen in the ſame ſtation, hired or engaged to ſerve on board ſuch ſhip at the time of "her laſt departure from *Great Britain*, unleſs the "governor, chief magiſtrate, collector, or comptroller of ſuch port ſhall think that greater, or

"more

" more wages than double the monthly wages afore-
" ſaid, ſhould and ought to be given to ſuch ſea-
" man or mariner; and do and ſhall authorize, or
" direct the ſame to be given by writing under his
" hand; and then, and in ſuch caſe, the maſter or
" commander of ſuch veſſel, ſhall and may be at
" liberty to pay, and the ſeaman to take and re-
" ceive ſuch greater or higher wages as the go-
" vernor, chief magiſtrate, collector, or comptrol-
" ler ſhall direct, as aforeſaid."

The Plaintiff having procured a copy of the licence ſo given to the Defendant by the officer in *Jamaica*, the ſame was given in evidence, and was in the following words;

Jamaica, Pariſh of Weſtmorland.

" Whereas it appears to me, the Hon. *George*
" *Murray*, Eſq. *cuſtos rotulorum*, and chief magiſ-
" trate of the pariſh of *Weſtmorland*, by the oath
" of *Lawrence Lacy*, maſter of the ſhip *Suffolk*,
" and lying at anchor in the port of *Savannah la*
" *Mer*, in the ſaid pariſh, and bound from thence
" to the port of *London*, in the kingdom of *Great*
" *Britain*, that he cannot engage ſeamen to carry
" his ſaid ſhip home at the rate allowed by the law:
" theſe are therefore to licence and permit the ſaid
" *Lawrence Lacy* to procure men on ſuch terms as
" he can, to navigate his ſaid ſhip, now loaded and
" ready to depart with convoy for *Great Britain*.

" Witneſs my hand,

" *At Savannah la Mer*, " *G. Murray*."
" *April 24th*, 1799.

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The counſel for the Defendant contended, that the Plaintiff could not recover: That the captain was only authorized to give wages beyond the double wages given on the outward bound voyage by virtue of a licence; which licence ought to be exactly conformable to the act of parliament: that the licence required by the ſtatute, ſhould ſpecify what wages ſhould be given; whereas the licence produced contained no reſtriction, but left the maſter at liberty to give wages to what extent he pleaſed.

It was anſwered by the Plaintiff's counſel, that the ſtatute having meant to exerciſe a controul over the giving of exorbitant wages, by certain regulations, intended, in particular caſes, to diſpenſe with them by means of a licence; but that it never could be the intention of the legiſlature to impoſe any limit on the wages to be given, where a licence was granted; as it might happen that no men could be procured at the ſum the governor or other officer might ſo limit; though they might be got at different rates of wages.

Lord ELDON ſaid, he was of opinion, the Plaintiff was not entitled to recover; the licence not being conformable to the act of parliament. By looking to the policy of the act, it would appear, that as, on the one hand, ſailors had exacted on the captains of *Britiſh Weſt India* ſhips, by demanding exorbitant wages, ſo the captains themſelves had been guilty of diſhoneſty and fraud, by endeavouring to ſeduce the ſeamen from other ſhips in the ſame trade by the offer of higher wages: that the act of parliament meant to prevent both parties from treating, and to lodge the diſcretion in thoſe who had

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no intereſt between them; that was in the chief magiſtrate of the iſland at which the ſhip was: that that diſcretion required him to ſettle the rate of wages. The words of the ſtatute were, "That the maſter ſhall be at liberty to give ſuch wages as the magiſtrate ſhould direct." Thoſe words muſt refer to an antecedent ſettlement of the wages. His Lordſhip added, I am therefore of opinion, that the ſtatute requires ſuch a licence to aſcertain what wages ſhall be given; and this not being in that form, the wages cannot be recovered.

The Plaintiff was nonſuited, with liberty to move to ſet the nonſuit aſide if the court ſhould differ in opinion with his Lordſhip on the conſtruction of the clauſe in the act.

Cockell, Serj. and *'Eſpinaſſe* for the Plaintiff.

Shepherd, Serj. and *Runnington*, Serjeant, for the Defendant.

In the next term, a new trial was moved for on the part of the Plaintiff; but the court of Common Pleas concurred in opinion with the Lord Chief Juſtice. 1 *Boſ.* v. *Pull.* Reports, *C. P.*

Same day.

SMITH *v.* KNOX.

It is no defence to an action by a *bona fide* holder of a bill, that the bill was an accommodation one, and that known to the holder.

ASSUMPSIT, on a bill of exchange by the Plaintiff as the indorſee of one *Vertaul*.

The bill was drawn by *Vertaul*, in his own favour, on the Defendant, who accepted it, and indorſed by *Vertaul* to the Plaintiff.

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The Plaintiff proved the hands-writing of the ſeveral parties to the bill, and there reſted his caſe.

Marſhall, Serj. for the Defendant, ſtated, that he reſted his defence upon two points; 1ſt, That the bill in queſtion was drawn upon the Defendant by *Vertaul*, and accepted without any conſideration; 2dly, That the Plaintiff had ſued *Vertaul*, and taken from him a warrant of attorney for the amount of the bill.

Lord ELDON. As to the firſt point: If a perſon gives a bill of exchange for a particular purpoſe, and that is known to the party who takes the bill; as for example, if to anſwer a particular demand, then the party taking the bill, cannot apply it to a different purpoſe; but where a bill is given under no ſuch reſtriction, but given merely for the accommodation of the drawer or payee, and that is ſent into the world, it is no anſwer to an action brought on that bill, that the Defendant, the acceptor, accepted it for the accommodation of the drawer, and that that fact was known to the holder; in ſuch caſe, the holder, if he gave a *bona fide* conſideration for it, is entitled to recover the amount, though he had full knowledge of the tranſaction.

As to the ſecond point, the ſeveral parties on a bill are chargeable in different order: the acceptor is firſt liable, and the indorſees in the order in which they ſtand on the bill; but the ſuing, or taking a ſecurity from one of the parties liable, ſhall not diſcharge another who is liable prior to him in point of order. In this caſe, the Defendant relies on the diſcharge of the drawer; the holder has a right to have recourſe to all the parties on the bill; and a ſecu-

The holder of a bill of exchange may give a diſcharge to a party on it, which ſhall not diſcharge one liable prior to him. *Aliter*, if the diſcharge is given to one ſubſequently liable. Vid. poſt *Engliſh* v. *Darley*.

a ſecurity given by the drawer cannot diſcharge the acceptor, who is liable prior to him.

It is ſaid, that the holder may diſcharge any of the indorſers after taking them in execution, and yet have recourſe to the others. I doubt of the law as ſtated ſo generally; I am diſpoſed to be of opinion, that if the holder diſcharge a prior indorſer, he would find it difficult to recover againſt a ſubſequent one; but in the preſent caſe, the diſcharge of the drawer, by taking his warrant of attorney, is no legal diſcharge to the acceptor.

Verdict for the Plaintiff.

Vaughan, Serjeant, and *Eſpinaſſe* for the Plaintiff.

Marſhall, Serjeant, for the Defendant.

ADAMS *v.* DAVIS.

A journeyman, by whom goods have been delivered, is a good witneſs to prove the delivery, without a releaſe: *aliter*, if it was proved to be cuſtomary to pay him for them.

ASSUMPSIT, to recover the amount of a baker's bill.

Plea, *Non-aſſumpſit*.

The Plaintiff called ſeveral witneſſes, who had been his journeymen while the bread had been furniſhed, and who proved the delivery of it at different times.

Clayton, Serjeant, for the Defendant, objected: that the witneſſes ought to have been releaſed; that the Defendant might have paid the journeymen, and they have not accounted for it to the maſter; that they would in ſuch caſe be liable over to him; they ought

ought to be releaſed, inaſmuch as they were ſwearing to diſcharge themſelves.

Lord *Eldon* ſaid, witneſſes of this deſcription were always admitted from neceſſity; nor did he ſee how this caſe was to be diſtinguiſhed from the common one. If there was evidence that the common uſage of the buſineſs was for the journeymen to receive the money for the bread delivered, it might alter the caſe; but that not being the caſe, he was of opinion that a releaſe was unneceſſary.

The Defendant had a verdict.

Shepherd, Serjeant, and *Lawes* for the Plaintiff.

Marſhall, Serjeant, and *Clayton*, Serjeant, for the Defendant.

ENGLISH *v.* DARLEY.

ASSUMPSIT by the Plaintiff, as indorſee of a bill of exchange againſt the Defendant, as the indorſer.

If the holder of a bill of exchange accept of a ſecurity from, or give time to a party on the bill, it is a diſcharge to a party liable, ſubſequent to him in order, but not to one liable prior to him in point of order.

The Plaintiff proved the hand-writing of the Defendant, and notice of non-payment by the acceptor; and there reſted his caſe.

The defence relied upon on the part of the Defendant, and which he gave in evidence was, that the Plaintiff having commenced actions againſt the acceptor and himſelf, had obtained a judgment againſt the acceptor, and ſued out execution againſt him; that a compromiſe had afterwards taken place

between them, and he had accepted 100l. in part diſcharge, and taken a bond and warrant of attorney for payment of the remainder, by inſtallments: this, his counſel contended, was a diſcharge in point of law.

The Plaintiff's counſel contended, that the holder having a right to ſue all the parties, was not deprived of his remedy againſt any of them until actual payment, where he had proceeded at law againſt all, and there was no laches; and relied on *Hayling* v. *Mulhall*, 2 *Black.* Rep. 1235; and *Macdonald* v. *Bovington*, 4 Term Rep. 825.

Lord ELDON. I am of opinion, that the Plaintiff, by the agreement with the acceptor, and the taking a new ſecurity from him, has diſcharged the Defendant; and that the preſent action cannot be ſupported. It is true, the holder of a bill of exchange has his remedy againſt all the parties on a bill; but the holder has it not in his power to give time to a party on the bill firſt liable, and afterwards to proceed againſt another; the holder may give time to his immediate indorſer; he may diſcharge him out of cuſtody, at the ſame time that he is proceeding to execution againſt a prior indorſer to him, or againſt the drawer or acceptor; but he cannot give time to or diſcharge the drawer or acceptor, and afterwards proceed againſt that indorſer. Suppoſe the holder, a ſecond indorſee, ſhould give time to the payee, the firſt indorſer, and take his warrant of attorney, payable at a future time, could he proceed, and take out immediate execution againſt his immediate indorſer? I think not; for if *that* indorſer paid the money, he would

would have a right to resort immediately to *his indorser*; that is, to the payee who had before had time from the holder: this is inconsistent. I recollect a case in the bankruptcy, I think, of *Lewis* and *Potter*, where the holder of a bill having entered into a composition with the acceptor, and afterwards proved the amount of the bill under the indorser's estate, the Chancellor, on a petition, ordered the debt to be expunged. I am of the same opinion; and as the Plaintiff, in this case, has accepted a security from the acceptor, he has, in my opinion, discharged the Defendant the indorser; and must be nonsuited.

Cockell, Serjeant, and *Best* for the Plaintiff.

Shepherd, Serjeant, and *Lens*, Serjeant, for the Defendant.

Vide *Dyke* v. *Mercer*, 2 Shower, 394; *Walwyn* v. *St. Quintin*, 1 Bos. and Pull. 652.

In the next term the Plaintiff moved for a new trial; but the court concurred in opinion with Lord *Eldon*, and refused the rule.

KIDD *v.* RAWLINSON.

Where a party purchaſes goods from the ſheriff, and takes a bill of ſale of them, it differs from a bill voluntarily given by the debtor as a ſecurity; that the party need not take immediate poſſeſſion under the former bill of ſale, but muſt under the latter.

THIS was an action for money had and received. Plea of *Non-aſſumpſit.*

One *Abrun*, a publican, being indebted to a judgment creditor; a *fieri fac.* was ſued out againſt him, and the ſheriff of *Surry* took his goods in execution under it. The Plaintiff *Kidd*, who was brother-in-law to *Abrun*, purchaſed the goods from the ſheriff's broker, and took a bill of ſale of them, dated the 3d of *November*, 1798. The Plaintiff did not take poſſeſſion of the goods, but permitted *Abrun*, his wife and family, to remain in poſſeſſion of them, in the houſe.

Abrun afterwards became indebted to the Defendant *Rawlinſon*, by whom he was arreſted, and put into priſon. The debt was 14*l.* and it was agreed, while *Abrun* was in priſon, that *Rawlinſon* ſhould keep the houſe open and put in beer; for which it was calculated that an addition was to be made to *Abrun*'s debt of 10*l.* and *Abrun* agreed to give a bill of ſale, which was made out for 29*l.* being the debt and expences.

Rawlinſon entered, and took poſſeſſion, under his bill of ſale; the Plaintiff gave him a notice that the goods were his, under a fair purchaſe, and not to ſell them.

The goods however were ſold for 26*l.* but half a year's rent being in arrear, for which the landlord diſtrained, amounting to 12*l.*, that ſum was paid to him;

him; and the preſent action was brought to recover the remaining ſum, ariſing from the ſale of the goods.

The counſel for the Defendant, upon theſe facts, contended, that the Plaintiff ought to be nonſuited: that claiming title under a bill of ſale, under which he had not taken poſſeſſion, it ſhould be deemed fraudulent, and the Plaintiff could make no title under it; and cited *Twine*'s caſe, 3 Co. Rep. 80.

For the Plaintiff it was anſwered, that the bill of ſale, under which the Plaintiff claimed, was not a voluntary bill of ſale, but a purchaſe from the ſheriff; and that it was ſuch property as gave him a title againſt all other perſons claiming under *Abrun*.

Lord ELDON ſaid, he was of opinion that the Plaintiff was entitled to recover. In the caſe of a voluntary bill of ſale it had been decided, that it was void, unleſs the perſon claiming under ſuch bill of ſale took immediate poſſeſſion; but that was the caſe as between debtor and creditor, where it was given by the former as a ſecurity to the latter: that was *Twyne*'s caſe. In the preſent caſe, the property was fully and fairly transferred to the Plaintiff, by the ſale made by the ſheriff. If, however, there was any fraud, as between *Abrun* and *Kidd*, that would vitiate the tranſaction; he would, therefore, leave it to the jury to ſay, whether it was a fair tranſaction, and the money *bona fide* advanced by *Kidd*, and the goods fairly transferred to him by the ſheriff's bill of ſale?

The jury found for the Plaintiff, that the tranſaction was *bona fide*.

Shepherd, Serjeant, and ——— for the Plaintiff.
Marſhall, Serjeant, and *Manley* for the Defendant.

2 Bof. and Full. 59.

In the next term, the Defendant moved to have a nonſuit entered; but the court of Common Pleas agreed in opinion with Lord ELDON, and refuſed the rule.

Vide *Edwards* v. *Harben*, 2 Term Rep. 587; and Bull. N. P. 258.

SITTINGS AFTER TERM AT GUILDHALL.

KUFH and others, *v.* WESTON and others.

Dec. 9th, 1799.

Notice of the non-acceptance, or non payment of a bill of Exchange, is ſufficiently given, by proving that a letter was regularly put into the poſt, informing the party of the fact.

ASSUMPSIT, to recover the amount of a foreign bill of exchange, drawn by one *Garde*, at *Exeter*, on Meſſrs. *Guetano*, *Drago*, and *Walſh*, at *Genoa*; the bill had been ſent up to the Defendants, and they had ſold it to the Plaintiffs in *London*.

The bill had been preſented for acceptance at *Genoa*, and the acceptance refuſed; the defence was, that it had not been preſented in a reaſonable time, nor the proteſt for non-acceptance ſent to this country as ſoon as it ought to have been; and that, therefore, the Defendants had not had due notice of its being diſhonoured.

In anſwer to this, it was proved that the bill had been put into the poſt-office at *London*, the third day after

after it had been received from the Defendants, which was the firſt *Italian* poſt day after it had been ſo received. It was further proved, that from the diſturbed ſtate of *Italy* for ſome time before, the regular poſt had been interrupted, and the bill had not arrived at *Genoa* till a month after it became due; that it was immediately preſented for acceptance; which being refuſed, it was proteſted, and the proteſt ſent off immediately by the poſt to *England*.

A Mr. *Keith*, a partner in a mercantile houſe at *Genoa*, proved that letters which he had put into the poſt in this country, ſo far back as *February*, had not arrived at *Genoa* when the laſt mail which had arrived from that place had left it; and ſaid, it was an extraordinary piece of good fortune that the parties had had notice of the bills being diſhonoured ſo ſoon, as from the diſtracted ſtate of the country, he had been obliged to forward letters by many different conveyances, out of the common courſe of the poſt.

Lord KENYON ſaid, that the Defendants grounded their defence on the ſuppoſed *laches* of the Plaintiff; but he was of opinion that if the Plaintiffs had ſent the bill by the ordinary courſe of the poſt, they had done all they were called upon to do; that they could not foreſee that the poſt would be interrupted; and it could not be expected that they ſhould ſend the bill by a ſpecial meſſenger, or any extraordinary mode of conveyance. His Lordſhip ſaid, he therefore thought the Plaintiffs had been guilty of no *laches*, and were entitled to recover; and they accordingly had a verdict.

Erſkine and *Vaillant* for the Plaintiff.

Gibbs and *Praed* for the Defendant.

Same day.

UNDERHILL *v.* WITTS.

Where a perſon is appointed conſtable, and he procures a deputy to ſerve for him, who is ſworn in at the leet and approved of by the inhabitants; if he abſconds and does not ſerve, the principal is nevertheleſs diſcharged.

THE declaration in this caſe ſtated, that the Defendant, being an inhabitant and reſident within the ward of *Broad-ſtreet*, had, at a wardmote, been choſen conſtable: that the Plaintiff was alſo an inhabitant and reſident within the ſame ward; and that, in conſideration that he would act as a ſubſtitute for the Defendant, he undertook to pay, &c. and the action was brought to recover the ſum ſo promiſed to be paid for ſerving as ſuch ſubſtitute.

Plea of the general iſſue, and notice of ſet-off.

To prove the Defendant having been elected conſtable, a clerk in the town-clerk's office was called, who produced a liſt of the perſons ſworn in to ſerve the office of conſtable, in which the Plaintiff's name was inſerted, as having been ſworn in as ſubſtitute for the Defendant to ſerve for that ward.

It was objected, that this was not the beſt evidence; and that the wardmote-book, containing an account of the election, ſhould be produced; and it was admitted that this would have been neceſſary if the Defendant had not acknowledged himſelf to have been elected conſtable.

To this Lord KENYON aſſented.

In the courſe of the cauſe, it appeared that the Defendant had been held to bail before the year for which he had been elected conſtable was expired; and *Garrow*, counſel for the Defendant, obſerved, that the Plaintiff had been premature, as he had a right to retain the money till the ſervice for which it was to be given, was performed; that the Plaintiff

tiff might have run away before the expiration of the year; and the Defendant might have been called upon to ſerve the office for remainder of the time.

Lord KENYON interrupted him, and ſaid, that when a ſubſtitute was approved by the inhabitants, and ſworn in at the leet, the liability of the principal was at an end; and that he could not afterwards be called upon to ſerve the office.

Upon the ſet-off, the Defendant had a verdict.

Mingay and *Peake* for the Plaintiff.

Garrow for the Defendant.

TRAPP *v.* SPEARMAN. Eſq.

Same day.

ASSUMPSIT on a bill of exchange, by the indorſee againſt the acceptor.

To make a bill of exchange void for an alteration, it muſt be in a material part,—as in the ſum, or date.

The defence attempted to be ſet up was, that an alteration had been made in the bill after it was given. The alteration was, "when due at the *Croſs-keys, Blackfriars Road*;" which, *Erſkine* contended, rendered the bill void.

Lord KENYON ſaid, that this was not an alteration either in the time of payment, or in the ſum: that to make a bill of exchange void, by reaſon of an alteration, it ſhould be in a material part; though it had been formerly holden, that the even telling up a ſum on a bill, or writing any thing upon it, would invalidate it, that ſtrictneſs was now exploded: and as the alteration in the preſent caſe was not in a material part, but only pointing out the place where the bill was to be paid, it was not ſuch an alteration as ſhould invalidate the bill.

This

This being the only ground of defence, the Plaintiff had a verdict.

Garrow and *Giles* for the Plaintiff.

Erſkine for the Defendant.

BOEHTLINCK *v.* SCHNEIDER, Aſſignee of CRANE a Bankrupt.

To prove the laws of a foreign country, it muſt be done by documents properly authenticated from that country; and cannot be proved by parol.

TROVER for a quantity of tallow.

The caſe in evidence was,—*Crane*, a merchant in *London*, by a letter dated *Sept.* 18, 1798, ordered the tallow from the Plaintiff, who reſided in *Ruſſia*. On the 18th of *October* following, twenty caſks of it were ſhipped at *Cronſtadt*, on board the *William*, Captain *Iſherwood*, and the remainder the next day. The ſhip arrived in *London* in *December*. *Crane* committed an act of bankruptcy on the 16th of *October*.

On the ſhip's arrival in *London*, the cargo was claimed by the Plaintiff's agents, on the ground of a right to ſtop it *in tranſitu*, before it was delivered to the Defendant, who afterwards got poſſeſſion of it.

The Defendants relied on their right to retain the poſſeſſion of it, on the ground that the ſhip was chartered by *Crane*, and that a delivery on board the ſhip was a delivery to him; ſo that it could not be ſtopped *in tranſitu*.

The Plaintiff's counſel gave in evidence a letter, dated the 19th of *October*, from the Plaintiff, requiring

ing *Crane* to give ſecurity to their correſpondent in *London* before the goods ſhould be delivered.

If goods abroad are put on board a ſhip chartered by the conſignee, the conſignor cannot afterwards ſtop them in *tranſitu*.

Lord KENYON. The whole queſtion is, Whether there was a delivery to *Crane* of the goods before this letter was written or not? Before the delivery, the party may annex any condition to it; but not after. If the ſhip was then chartered by *Crane*, it is a complete delivery of the goods to him; and there can be no ſtopping *in tranſitu*.

It being aſked by one of the jury, Whether it made any difference that *Crane* had then committed an act of bankruptcy?

Lord KENYON ſaid that it made none.

Law, for the Plaintiff, ſtated, that by the law of *Ruſſia*, though the goods had been ſo delivered at *Cronſtadt*, the ſhippers might ſtop them *in tranſitu*; and propoſed to call a perſon converſant with the law of that country, to prove that the law was ſo.

Lord KENYON ſaid, he could not admit ſuch evidence of the law of a foreign country.

Law contended, that there was a difference between the written and the unwritten law of a country: that the former muſt be proved by production of ſuch written law itſelf; but the unwritten law was matter of fact, and could only be proved by parol, by perſons who were acquainted with it; and ſaid that in a caſe of *Neville* v. *Gilchriſt*, ſuch evidence had been admitted.

Lord KENYON. Can the laws of a foreign country be proved by a perſon who may be caſually picked up in the ſtreet? Can a court of juſtice receive ſuch evidence of ſuch a matter? I ſhall expect it to be made out to me, not by ſuch looſe evidence, but by proof from the country, whoſe laws you propoſe

to

to give in evidence, properly authenticated. In the caſe of *Morris*, who married the daughter of Lord *Baltimore*, in *Holſtein*, the laws of that country reſpecting marriage were given in evidence, not by parol, but by documents properly authenticated. In the great caſe of the *St. Jago* prize-money, it was found to be neceſſary to ſend to *Spain* for an authenticated document of the laws of that country. Such proof, and ſo authenticated, I ſhall admit, as ſuch only I hold to be legal.

His Lordſhip therefore rejected the evidence; and the Plaintiff was nonſuited.

Law and *Wood* for the Plaintiff.

Erſkine and *Gibbs* for the Defendant.

In the next term the Plaintiff moved for a new trial, on the ſuppoſed admiſſibility of the teſtimony; but the court of King's Bench concurred in opinion with his Lordſhip.

Dec. 13.

BARBER *v.* GINGELL.

If the Defendant ſets up as a defence to a bill of exchange, that it has been forged, and proves it to be ſo, it will be a good anſwer for the Plaintiff to ſhew that the Defendant had paid other bills of the ſame party under ſimilar circumſtances.

ASSUMPSIT on a bill of exchange for 240*l.* Plea, *Non-aſſumpſit.*

The bill was drawn by *John Taylor*, in his own favour, on the Defendant, and accepted by him, and indorſed by *Taylor* to the Plaintiff.

The defence was, 1ſt, That the acceptance of the bill was forged; 2dly, That after the bill became due, *Taylor*, the drawer, had paid 40*l.* in money, part of the bill, and given a bill for the remainder, which had been regularly paid.

To prove the acceptance, the Plaintiff called the notary's clerk. The bill was due the 4th of *Auguſt*

guſt (Sunday): the clerk proved, that on the *Saturday* preceding, he had demanded payment of the bill of the Defendant at his houſe; that he did not look at the bill, but deſired the clerk to call on the *Monday*, as he had then no effects.

The Plaintiff's counſel contended, that this evidence precluded the Defendant from going into the defence of forgery, as the Defendant had not denied his acceptance, but promiſed payment of the bill on the *Monday*, the Plaintiff being by that means prevented from ſeeking payment from the other parties on the bill, and in fact that it was an admiſſion of his acceptance.

Lord KENYON was of opinion, that it did not ſhut out the defence of forgery, as the Defendant had not looked at the bill.

The Defendant proved the bill to be an actual forgery.

The Plaintiff then proved that the Defendant had been connected with *Taylor* in buſineſs: that he had in fact paid ſeveral bills drawn as the preſent by *Taylor*, and to which *Taylor* (as it was ſuppoſed) had written the acceptance in the Defendant's name.

Lord KENYON ruled, that that was an anſwer to the caſe of forgery ſet up by the Defendant; for though the Defendant might not have accepted the bill, he had adopted the acceptance, and made himſelf thereby liable to the payment of it.

The Defendant now proceeded to the defence, on the ground of the payment by *Taylor*.

To prove that fact, his counſel called *Taylor* the drawer.

He

He was at that time a priſoner in *Chelmsford* gaol, on a charge of forgery of the bill in queſtion (among others) and brought up by *habeas corpus*.

A party in priſon on a charge of forgery of a bill of exchange, is an admiſſible witneſs to prove payment of it on an action being brought to recover it.

The Plaintiff's counſel objected to his evidence. That the witneſs then ſtood in the ſituation of a perſon under a criminal charge for forgery of the bill in queſtion: that it would be of great importance at the trial of the indictment to connect the witneſs with the bill in queſtion: that if examined in chief by the Defendant's counſel, to prove the fact for which they propoſed to call him, he muſt be ſubjected to the croſs-examination of them as the Plaintiff's counſel, which muſt either go to criminate him, or they would not have equal advantage with the Defendant's counſel, if the witneſs objected to the queſtions which had that tendency: that a ſimilar rule had been laid down in the State Trials of *Hardy* and *Tooke*: and that, in Lord *Macclesfield*'s caſe, when the queſtion was aſked of a maſter in chancery, What was the higheſt price ever paid for a place of a maſter? The queſtion was overruled, and held that it could not be aſked.

It was anſwered by the Defendant's counſel, that it never had been thought of as an objection to a witneſs, that one party ſhould be deprived of the benefit of a witneſs's teſtimony, becauſe he might object to ſome of the queſtions put to him on his croſs examination: that the anſwers to the queſtions which they propoſed to put, could not affect the witneſs, whether the acceptance was forged or not; as the only fact they wanted to aſcertain by his teſtimony was, whether the bill had been paid or not?

Lord

Lord KENYON ſaid, he thought he ought not to reject a witneſs, becauſe on his croſs-examination a queſtion might be aſked, by which he might be affected; nor ought he to prevent a party from having the benefit of his teſtimony. That the object for which he was called was a collateral matter, and not imputing any criminality, and that he ſhould prevent a witneſs ſtanding in the circumſtances of the preſent from criminating himſelf. The rule as ſtated to be laid down from the State Trials, appeared to him too general as to the admiſſion of the witneſs; and that he ſhould admit him.

Taylor was called; but on being put into the box, refuſed to anſwer any queſtion reſpecting the bill. The Defendant having no other witneſs, the Plaintiff had a verdict.

Law, *Garrow* and *Giles* for the Plaintiff.

Erſkine and *'Eſpinaſſe* for the Defendant.

THOMPSON *v.* DONALDSON.

ASSUMPSIT on a policy of inſurance on a ſhip from *Demerary* to *London*.

To prove a perſon dead, the proſecution of the letters of adminiſtration granted by the ordinary, is not of itſelf ſufficient evidence.

It became a queſtion how far the underwriter was bound from the ſigning of the memorandum, before the policy was actually ſigned.

Lord KENYON ſaid, that he ſhould hold the underwriter bound from the time of the ſigning the memorandum, if the policy was actually ſigned afterwards.

The

The defence relied on was, that a perſon of the name of *Donoghoe*, in whom the intereſt was averred to be, was dead at the time of effecting the policy.

To prove this, the Defendant's counſel propoſed to give in evidence the letters of adminiſtration, granted to a perſon as adminiſtrator to *Donoghoe*.

Lord KENYON ſaid, he would expect further proof of the perſon's death than the mere production of the letters of adminiſtration: adminiſtration had often been fraudulently taken out when the party had been living, and afterwards been repealed. Whether *Donoghoe* was living or dead was a fact capable of other proof, which the Defendant ſhould have been prepared with.

The Defendant having no other evidence, the Plaintiff had a verdict.

Erſkine and *Giles* for the Plaintiff.

Law and *Garrow* for the Defendant.

Vide *Lloyd* v. *Finlayſon*, ante vol. 2, 564.

RUNQUIST *v.* DITCHELL.

If a ſhip is put up at the Royal Exchange and at the coffee-houſe by the ſhip's broker, as a general ſhip warranted to ſail with convoy, and hand-bills are put about to the ſame effect, this is ſuch a repreſentation as ſhall bind the principal.

THIS was a ſpecial action on the caſe.

The action was brought againſt the Defendant as the owner of the ſhip *Cromer*, under the following circumſtances: She was put up at the coffee-houſe as a general ſhip for *Oporto*, warranted to ſail with convoy: the Plaintiff ſhipped goods on board her, and effected a policy on her, "on goods on board the *Cromer*, warranted to ſail with

with convoy." She did not ſail with convoy, and was loſt: by reaſon of not complying with the warranty, the policy became void as againſt the underwriters; and the preſent action was brought to recover in damages the value of the goods, which it had been intended ſhould have been covered by the policy.

The ſhip-broker was called: he proved that he had put up the ſhip as a general ſhip for *Oporto*, at the uſual places at the Royal Exchange; that the captain had during that time been frequently at the Exchange; that he had ſigned bills of lading, in which the ſhip was warranted to ſail with convoy; and that hand-bills to that effect had been handed about.

The captain was called; but denied having given any authority ſo to repreſent the ſhip.

Lord KENYON ſaid, the Defendant muſt be bound by the act of his agent the broker; if he did what he had done, without authority, it was a queſtion between the Defendant and his agent; the public had nothing to do with it.

Garrow contended, that if the agent exceeded his authority, the principal was not bound by it; and that there was not ſufficient evidence in this caſe to bind the principal (the Defendant) and to make him liable.

Lord KENYON ſaid, that he thought there was a ſufficient repreſentation of the ſhip's ſailing with convoy, from the manner in which it was publiſhed and announced to the world; it was in the common and uſual way. He remembered a caſe at *Hereford*, where a gentleman having loſt ſome horſes, an hand-

bill was put out, and generally circulated, offering a reward for the recovery. A perſon having enabled him to recover the horſes, applied for the reward offered by the advertiſement; which the gentleman then thought fit to diſavow. An action was brought; and it was held, that the publicity of the hand-bills, and their general circulation, muſt be ſufficient to charge the party with being privy to their circulation; and the Plaintiff recovered.

As to the agent having exceeded his authority, that made no difference in the caſe: many caſes might be put, where a perſon has authorized another to do acts for him, and who has been bound by his acts tho' exceeding his authority; ſuch as merchants who have authorized their clerks to accept bills for them; and many other inſtances. He was therefore of opinion, that the Defendant was here bound by the acts of his agent, and the Plaintiff entitled to recover.

The jury found a verdict for the Plaintiff.

Erſkine and *Giles* for the Plaintiff.

Garrow for the Defendant.

Vide 3 Term Rep. 763; and *E. I. Company* v. *Henſley*, ante vol. i. 111.

BULLER and others *v.* FISHER and others.

Where there is an exception in a charter-party of "*perils of the sea*," a loss from the ship's running foul of another by misfortune is within the exception, and is a loss by perils of the sea.

THIS was an action against the Defendants, as the owners of the ship *Atlas*, to recover damages for the loss of goods which had been shipped by the Plaintiff.

The bills of lading were in the usual form, with an exception of the *perils of the sea*.

The case as it appeared in evidence was, that two ships, called the *Patriot* and the *Matthew*, were sailing in one direction, and the *Atlas* in another; the *Matthew* was to leeward when they saw the *Atlas* coming; the *Matthew* steered to keep closer to the wind, in order to give the *Atlas* an opportunity to pass: the *Atlas* mistook the object; and unable to weather both ships, she and the *Patriot* ran foul of each other, and the *Atlas* went down.

The action being against the Defendants on the charter-party, it was admitted that if the injury could be deemed to be an accident arising from the perils of the sea, the Defendants were excused under that clause in the charter-party; but it was contended, that the *Matthew* having endeavoured to keep out of the way of the *Atlas*, the accident happened from the negligence of the crew of the latter; and so could not be deemed a peril of the sea.

Lord KENYON said, if the Defendants have been guilty of any degree of negligence, and it could have been proved that the accident could have been

produced a deed of conveyance of all their intereſt in the ſhip to certain perſons in *Liverpool* (to which port the ſhip belonged) mentioned in the conveyance; that there had been a regular indorſement on the certificate of regiſtry, entered with the proper officer of the port of *Liverpool*, and a copy of it tranſmitted to the cuſtom-houſe in *London*; and that all theſe matters had taken place before the month of *October* 1798; from whence their counſel contended, that they had conformed to every thing required by the ſtatutes 26 *Geo.* III. ch. 60, and 34 of *Geo.* III. ch. 68; and that the omiſſion of the entry of the names of the new owners in the cuſtom-houſe books of the port of *London*, was a neglect of the officer, from which they ought not to ſuffer.

The Plaintiff's counſel contended, that in all the caſes which had occurred on theſe ſtatutes, a ſtrict conſtruction had been put, and that the regiſter of the transfer of the ſhip in the cuſtom-houſe books of the port of *London* was neceſſary to the complete transfer of the property, before which time nothing veſted in the purchaſers, and of courſe that they could not be deemed legal owners at the time of commencing the action.

Lord ELDON having referred to the ſtatutes, ſaid, the ſtatutes contained clauſes of different natures; in ſome of the clauſes it was expreſsly ordered, that certain requiſites ſhould be complied with, on failure of which, the ſtatutes had declared the transfer to be null and void; but that there were other clauſes which were merely directory, of which deſcription he was of opinion that which reſpected the regiſtry

giſtry was; that any defect in the form of regiſtering did not make the ſale void; and that the ſale notwithſtanding might be valid, and the property completely out of the vendors; but that in the preſent caſe the regiſter was regular at *Liverpool*, to which port the ſhip belonged; and he would not allow the omiſſion or irregularity of the clerk of the cuſtom-houſe in *London*, whoſe duty it was to make the entry, and to whom it had been regularly tranſmitted, to deſtroy the validity of ſuch a contract.

The Plaintiff was nonſuited.

Cockell, Serjeant, and *Eſpinaſſe* for the Plaintiff.

Shepherd, Serjeant, and *Littledale* for the Defendant.

Vide *Rolleſton* v. *Hibbert*, 3 T. Rep. 406.

SIGARD *v.* ROBERTS.

ASSUMPSIT for ſeaman's wages againſt the Defendant, as the captain of the ſhip *Elizabeth*, on a voyage from *Hamburgh* to *Tranquebar*, from *Tranquebar* to any port the captain ſhould think proper; and from thence to the port of *Hamburgh*, or any other port of delivery.

If ſeamen go on ſhore on the ſhip's duty, and when the boat is about to return requeſt to be permitted to remain on ſhore to get ſome victuals, which is refuſed, and the boat goes without them; if they afterwards go and offer to return to their duty on board the ſhip, it is not a deſertion.

The Plaintiff ſigned the articles, and ſailed on the voyage to the *Iſle of France*, where ſhe took in a cargo of coffee, ſugars, &c. for *Hamburgh*, and was proceeding on her voyage, when ſhe was met on the 29th of *March* 1799, in the *North Seas*, by his Majeſty's ſhip the *Lord Duncan*, and taken and brought into the *Downs*, and libelled in the court of Admiralty as enemies property.

It was given in evidence for the Plaintiff, that he had come on ſhore with a boat from the ſhip, accompanied by the ſecond mate and the ſurgeon: that he had remained on ſhore: but it appeared, that he and the other ſeamen, on being required to get on board, ſaid they had had no victuals the whole of the day, and only requeſted to ſtay till they had ſome; and that being then left on ſhore, they had gone to the ſhip the next morning, when the Defendant refuſed to receive them, and diſmiſſed them, refuſing to pay them their wages, and deſiring them to go to *Hamburgh* and ſeek them.

The counſel for the Defendant reſted their defence, 1ſt, On the clauſe in the articles by which the crew were to ſerve on the voyage above ſtated, and back to *Hamburgh*, or wherever elſe the port of delivery ſhould be: that the ſhip not having arrived at *Hamburgh*, or at any other port of delivery, the action was not maintainable until either of thoſe events took place: 2dly, That by another (the 7th) clauſe in the articles, no ſeaman was to demand any money of the captain, but to be content with the wages he had received in advance until the voyage was ended, the cargo unloaded, and the ſhip cleared and brought into the proper moorings, under penalty of ſix marks; ſo that this was a bar to the Plaintiff's recovery in this country: 3dly, That this was a deſertion, by which the ſeaman forfeited his wages, under the laſt clauſe in theſe articles.

Where, by a clauſe in the ſhip's articles, the ſeamen are not to be entitled

Lord ELDON. By the laſt clauſe in theſe articles, deſertion is a forfeiture of wages; the law would have held the ſame language: the principal queſtion, there-

therefore, here is, Is this a deſertion? The Defendant undertakes to prove that it is: but, from the circumſtances of the caſe, I am of opinion that it is not: the Plaintiff and the other ſeamen only requeſted to be permitted to remain on ſhore to have ſome victuals; it was a reaſonable requeſt; they had no intention of abandoning the ſhip; they in fact went on board as ſoon as they had the means, and were refuſed to be received. After thus offering to return to their duty, the captain ſhall not be permitted to call ſuch conduct a deſertion, when the whole conduct of the Plaintiff ſhewed that no ſuch was intended.

to their wages until the voyage was ended, and that voyage was to a foreign port, if the maſter for no good or legal cauſe diſmiſſes the ſeaman before the ſhip's arrival at ſuch port, he may immediately maintain an action for his wages.

The ſecond queſtion ſet up by the Defendant is, that the wages, if any are due, are recoverable at *Hamburgh* only; and it is therefore contended, that the captain cannot be ſued in a foreign court of juſtice. It is a very wholeſome proviſion, and it may be right law, that if a ſhip is captured, and the maſter and ſailors all diſmiſſed by the force of third perſons, ſuch clauſe ſhould be effectual; but the queſtion is, has the Plaintiff a right to ſue *here?* In this caſe the captain diſcharges the ſailor. I ſhould be ſorry to ſtate, that when the captain diſcharges the ſeaman, ſuch ſeaman has not a right to ſue for his wages. The ſeventh clauſe does not contain an expreſs prohibition to ſue in any country when the voyage is ended; this clauſe therefore cannot prevent the ſailors ſuing for their wages when the maſter diſcharges them; the voyage then is ended as to the man who is diſcharged from the ſhip.

Verdict for the Plaintiff.

Cockell

Cockell and *Wigley* for the Plaintiff.
Shepherd and *Taddy* for the Defendant.

Dec. 18.

WHALLEY *v.* WRAY.

On a declaration againſt a lighterman in the common form for negligence, the Plaintiff cannot recover if it appear that the loſs was not occaſioned by a neglect of the common and ordinary duty of the Defendant.

THIS was an action of *aſſumpſit* againſt the Defendant, as a lighterman, for damage done to the Plaintiff's goods, which had been intruſted to him to depoſit in the Plaintiff's warehouſe.

The declaration was in the common form: *viz.* That the Defendant being a lighterman, &c. had undertaken to carry the Plaintiff's goods, and to deliver them ſafely; and then averred a loſs by negligence.

The facts of the caſe were, that a quantity of rice had been delivered on board the Defendant's lighter, to be landed at the Plaintiff's warehouſe. Previous, however, to rice being permitted to be landed, it is neceſſary to preſent a petition to the commiſſioners of the cuſtoms, who refer it to the land-ſurveyor, upon whoſe report it is permitted to be landed.

In this caſe, a petition had been preſented to the commiſſioners by Mr. *Stevenſon*, who was the cuſtom-houſe agent to the Plaintiff; but no report having been made on it, the land-ſurveyor refuſed to permit the rice to be landed; in conſequence of which, it remained in the lighter undiſcharged, where it received the damage for which the preſent action was brought.

It appeared in evidence, that the preſenting the petition, &c. was uſually done by the cuſtomhouſe-agent

agent of the party to whom the rice belonged, and that it was not uſually done by the lighterman.

Lord ELDON. In this caſe, the Plaintiff has declared generally in *aſſumpſit*. To entitle the Plaintiff to recover, it muſt appear that the loſs happened by the neglect of doing that which was the regular and common duty of the Defendant. The law raiſes no preſumption of what is his duty: that is matter of evidence: here it is in evidence, that the preſenting the petition and the ſubſequent proceedings, was the buſineſs of the cuſtomhouſe-agent of the Plaintiff, not of the lighterman: if there had been any contract, or undertaking on the part of the lighterman, by the neglect of which the goods were ſpoiled, it ſhould have been the object of a ſpecial count: there is no ſuch count, and the Plaintiff has relied on the general liability of the Defendant without making it out in evidence, that it was the duty of the Defendant to have done that, from the neglect of which the loſs has ariſen.

The Plaintiff was nonſuited.

Cockell. Serj. and *Gibbs* for the Plaintiff.

Shepherd Serj. for the Defendant.

CASES

CASES

ARGUED AND RULED

AT NISI PRIUS,

HILARY TERM 40 GEO. III.

IN THE KING'S BENCH,
SECOND SITTINGS IN TERM.

CHANDLER *v.* PARKES and DANKS.

Where the Plaintiff declares on a joint contract, and one Defendant pleads infancy, the Plaintiff cannot enter a *noli prosequi* and proceed against the other Defendant in that action, but should commence a new action against the adult Defendant only.

THIS was an action of assumpsit, for work and labour, and materials found, against the two Defendants.

Plea, by the Defendant *Parkes*, of the general issue.

Danks, the other Defendant, pleaded infancy.

The Plaintiff entered a *noli prosequi* as to the Defendant *Danks*, and proceeded to issue with the other Defendant *Parkes*.

Lord KENYON, on the case being opened, and looking into the record, said, he doubted how the Plaintiff could recover against one Defendant only, in an action on a contract which he, by his declaration,

tion, had ſtated to be a joint one againſt two: that the infancy being admitted, the Plaintiff ought to have diſcontinued, and commenced a new action againſt the adult Defendant, as being the ſole contracting party according to the legal effect of ſuch a contract, which was void againſt the infant.

The Plaintiff's counſel contended, that the promiſe of an infant was not void, but voidable only; and if the Plaintiff had declared againſt the adult Defendant only, he could have pleaded in abatement, that the contract was a joint one, and quaſhed the Plaintiff's writ. They then cited the caſe of *Noke* v. *Ingham**, 1 *Wilſ.* 89, where, in a joint action againſt two, a *noli proſequi* had been entered againſt one, and held to be good.

Lord KENYON ſaid he continued of the ſame opinion; for the plea in abatement could not prevail, when it was diſcloſed that the other Defendant was an infant.

His Lordſhip nonſuited the Plaintiff.

Erſkine and *Lawes* for the Plaintiff.

Percival and *Jervis* for the Defendant.

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* The caſe of *Noke* and *Criſwell* v. *Ingham* is clearly diſtinguiſhable from this caſe; for in that caſe, which was on a writ of error, the plea by *Chiſwell*, one of the Defendants, was "bankruptcy." The Defendant entered a *noli proſequi* as to him. The objection was taken that the *noli proſequi* entered as to one, operated as a diſcharge to both; but it was overruled, inaſmuch as by the ſtatute 10 *Ann*, ch. 15, it is enacted, "that the diſcharge of a debt as to one partner, by his becoming a bankrupt, ſhould not diſcharge the other partner. By the operation of *the ſtatute*, therefore, the other Defendant remains ſolely liable. The caſe of *Noke* and *Ingham* therefore fortifies the opinion delivered by the Lord Chief Juſtice in this caſe.

SITTINGS

SITTINGS AFTER TERM AT WESTMINSTER, IN THE KING'S BENCH.

Doe ex Dem. GRIFFITHS *v.* LLOYD.

Where there is a demiſe of premiſſes, and an entire rent reſerved, if any part of the premiſſes could not legally be demiſed, the whole demiſe is void.

THIS was an action of ejectment, to recover the poſſeſſion of lands in the pariſh of *Shadwell.*

The leſſor of the Plaintiff was the rector of the pariſh.

By an act of parliament paſſed in the year 1670, for the endowment of the church of *Shadwell*, certain lands were appropriated, part for the ſupport of the parſon, and part for the purpoſe of building a houſe for his reſidence.

By another clauſe in the act of parliament, the parſon was impowered, with the conſent of the patron and ordinary, to leaſe for thirty-one years the lands allotted for the ſtipend of the rector: and he had himſelf a power of leaſing for twenty-one years without fine, reſerving the beſt rent which could be got.

In 1746 *Butler* was appointed rector of the pariſh: when he came into the pariſh, the whole of the land was let under leaſe. In 1776 he renewed that leaſe, at a rent of 23*l.* per ann.; in 1792 he renewed it at the ſame rent; and again in the year 1797.

Gibbs,

Gibbs, for the Plaintiff, ſtated, that the ejectment was brought to recover the whole of the premiſſes demiſed by the late rector: and the Plaintiff grounded his right to recover on two points; 1ſt, That no leaſe of the land could be good, unleſs made under the authority of the act of parliament: that the act only allowed the letting of the land allotted to the rector for a ſtipend: that here the demiſe was of the whole of the lands, and included the land on which the parſonage-houſe was to be built, which he ſtated, could not be demiſed.

Lord KENYON ſaid upon this point, that if the demiſe was of lands, and an entire rent reſerved, and there was any part which could not be legally demiſed, that the whole of the demiſe was void.

The ſecond point upon which the Plaintiff relied, was, that the beſt rent which could have been obtained for the lands had not been reſerved.

The Defendant's counſel anſwered, that in 1772 the lands were of very ſmall value; that the leſſee had then laid out 1000*l.* on them, and the renewals had been to him.

Lord KENYON. There having been ſurrenders of the leaſe in 1792 and 1797, it is not ſufficient to ſay that a rent reſerved before was a ſufficient rent then: the act of parliament ſays, there muſt be reſerved the beſt rent that can be got and obtained; that means, the beſt rent that can be *then* got; that is, at the time of letting. It is ſaid that in 1772 the premiſſes had been let on a repairing leaſe, and 1000*l.* expended on them: if the fact is ſo, a court of equity might give relief if the twenty-one years were not elapſed; but

In a leaſe of lands, for which the leſſor is bound to reſerve the beſt rent that can be got, he muſt reſerve the beſt rent that can be got at the time the leaſe is made, without any regard to a former leaſe in which the rent might have been fairly reſerved on account of money to have been then expended in improvements.

but ſitting in a court of law, I muſt look to the time of the laſt letting after the ſurrender in 1797; if the premiſſes were *then* not let for the higheſt price that could be got for them, the Plaintiff is entitled to recover.

The Plaintiff had a verdict.

Gibbs and *Praed* for the Plaintiff.

Erſkine and *Wood* for the Defendant.

ENGLAND *v.* BOURKE.

CASE, for words.

Plea, Not guilty.

The words laid in the declaration were, "you are a thief and a murderer."

The Plaintiff had been tried for murder, and acquitted.

Per Lord KENYON. There is no juſtification of the truth of the words; had there been, notwithſtanding the acquittal, I would have tried the truth of the plea.

Verdict for the Plaintiff.

Erſkine and *Onſlow* for the Plaintiff.

Mingay for the Defendant.

Vide poſt, *Cook* v. *Field*.

SITTINGS AFTER TERM
IN THE COMMON PLEAS,
AT WESTMINSTER.

SPEARS *v.* HARTLY.

February 19.

THIS was an action of trover, for a log of mahogany.

The Defendant was a wharfinger, and claimed a lien on it, as well for the wharfage as for the balance of a general account; which balance was due in the year 1790, under which lien he juſtified a right to retain it.

If by the cuſtom and uſage of trade, a party is entitled to a lien on goods for a general balance, and he gets poſſeſſion of the goods of his debtor, he may hold them till ſatisfied his whole demand, even though part of it was barred by the ſtatute of limitations.

Beſt, Serjeant, for the Defendant contended, that admitting the Defendant might claim a lien for the wharfage due on a particular article, he was not entitled to ſuch lien for the balance of a general account.

Lord ELDON referring to the caſe of *Naylor* v. *Mangles*, *ante* 1 vol. 109, ſaid, this point has been ruled by Lord KENYON, that a wharfinger has a lien for the balance of a general account, and conſidered as a point completely at reſt; I ſhall, therefore, hold it as the ſettled law on the ſubject, that he has ſuch a lien as is claimed in the preſent caſe.

Beſt then contended, that it appeared that the balance which the Defendant claimed to be due, and under which he entitled himſelf to a lien, had accrued in the year 1790, and ſo was barred by the ſta-

tute of limitations; the debt being therefore discharged by operation of law, the Defendant could not be entitled to any lien by virtue of it.

Lord ELDON. If what has been ſtated by the Defendant's counſel be law, that the debt is *diſcharged* by the operation of the ſtatute of limitations, no lien could be obtained by reaſon of it; but the debt was not diſcharged, it was the remedy only: I am of opinion, that though the ſtatute of limitations has run againſt a demand, if the creditor obtains poſſeſſion of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this caſe the Defendant had a ſubſiſting demand when the goods came to his poſſeſſion; and I am of opinion he may enforce it by the lien which the law has given him for his general balance.

Verdict for the Defendant.

Beſt, Serjeant, and *Reader* for the Plaintiff.

Cockell and *Bailey*, Serjeants, for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

CURTIS *v.* HANNAY, Bart.

To an action for the recovery of the price of a horſe, it is no defence that the warranty was untrue, if the Defendant was, after the ſale,

ASSUMPSIT for forty-five guineas, the price of an horſe ſold by the Plaintiff to the Defendant, who was an officer in the life-guards.

The horſe had been warranted; and the defence ſet up upon the part of the Defendant was, that the warranty

warranty had not been complied with, the horſe having defective eyes when ſold.

apprized of the fault of the horſe, and did not return him; but, afterwards, by the application of medicines, or otherwiſe, has leſſened the value of the horſe, from what it was at the time of the ſale.

It appeared that the Defendant had been informed of the defect in the eyes the day after he bought the horſe; that he however kept him for near ſeven weeks before he returned him, in the courſe of which time, ſuſpecting the horſe had ſome defect in his feet, he had applied a bliſter and ſome other medicine to the part; this produced a diſorder called a thruſh, and a conſiderable degree of lameneſs: it was, however, only a temporary lameneſs, and the horſe recovered of it; and it was in evidence that the remedies applied to the leg and foot could not have affected the eyes.

On this caſe being thus made out, Lord ELDON ſaid, he thought the matter ſet up by the Defendant was no defence to the action; it appeared that the horſe had defective eyes when ſold, and that that defect was made known to the buyer a very ſhort time after he had purchaſed him. Inſtead of returning him immediately, the Defendant doctored him: this produced a new diſorder, which the horſe had not when ſold. The queſtion was, Would the horſe when returned to the ſeller be diminiſhed in value by this doctoring? If he would, his Lordſhip ſaid, he thought the Defendant ſhould pay the price, and bring his action againſt the ſeller for any defect in the warranty exiſting at the time of the ſale. He took it to be clear law, that if a perſon purchaſes an horſe which is warranted, and it afterwards turns out that the horſe was unſound at the time of the warranty, the buyer might, if he pleaſed, keep the horſe, and bring an action on the warranty, in which he would have a right to recover the difference between

the value of a ſound horſe and one with ſuch defects as exiſted at the time of the warranty; or he might return the horſe, and bring an action to recover the full money paid; but in the latter caſe the ſeller had a right to expect that the horſe ſhould be returned in the ſame ſtate he was when ſold, and not by any means diminiſhed in value; for, his Lordſhip ſaid, if a perſon keeps a warranted article for any length of time after diſcovering its defects, and when he returns it, it is in a worſe ſtate than it would have been if returned immediately after ſuch diſcovery, I think the party can have no defence to an action for the price of the article, on the ground of non-compliance with the warranty, but muſt be left to his action on the warranty to recover the difference in the value of the article warranted, and its actual value when ſold.

His Lordſhip concluded with ſaying, that if the jury, thought that if any future purchaſer was to be told that the horſe had been bliſtered and doctored, it would diminiſh his value in the eſtimation of ſuch purchaſer, they ſhould find a verdict for the Plaintiff; which they accordingly did for forty-five guineas, the price agreed upon.

Cockell, Serjeant, and ——— for the Plaintiff.
Shepherd, Serjeant, for the Defendant.

GRATLAND *v.* FREEMAN.

Same day.

ASSUMPSIT for beer ſold by the Plaintiff, a publican, to the Defendant.

Where a party has dealt with a tradeſman on credit, it is not ſufficient to give notice to the tradeſman's ſervant that he meant to pay ready money in future, it muſt be given to the tradeſman himſelf.

It appeared that the Defendant had been in the habit of dealing with the Plaintiff upon credit, and had paid him occaſionally when the bill amounted to a certain ſum.

About the month of *October* he had paid his bill, and told the Plaintiff's ſervant who brought the beer, that he would run up no more bills with the Plaintiff, but would pay for the beer as it came in; and the defence was that he had paid the money to the ſervant.

Lord ELDON ſaid, he muſt ſhew that the maſter had notice of this change in the mode of dealing: unleſs he had done ſo, it muſt be taken that the Plaintiff underſtood that the dealings between him and the Defendant continued in the uſual way.

Marſhall, Serjeant, for the Defendant, contended, that this notice having been given to the Plaintiff's ſervant, and the money having been paid to the ſervant, the maſter ſhould be bound by it.

Lord ELDON ſaid, he thought not. It was a change in the uſual mode of dealing ſuggeſted by the Defendant himſelf; and as he had perſonal dealings with the maſter, in a particular mode, notice to the ſervant alone of a change in that mode would not be ſufficient; the Defendant muſt ſhew that the maſter himſelf had notice of it, or he could have no defence to the action.

The Defendant being unable to eſtabliſh that fact, the Plaintiff had a verdict.

Runnington Serj. and *Maddock* for the Plaintiff.

Marſhall Serj. for the Defendant.

HOULDITCH *et alt.* *v.* MILNE.

If a tradeſman, having goods in his poſſeſſion, upon which he has a lien, parts with thoſe goods on the promiſe of a third perſon to pay the demand, ſuch promiſe is not within the ſtatute of frauds.

ASSUMPSIT for the repair of carriages.

The caſe in evidence was, that the carriages belonged to a Mr. *Copey*; that the Defendant had ſent them to the Plaintiffs to be repaired, and had given orders reſpecting them.

One of the carriages had been bought by Mr. *Copey* himſelf, and paid for by him; and the bill which was the object of the preſent action contained a charge for repairs done to this carriage, and was made out in the name of *Copey*.

When the carriages were repaired, the Defendant ſent an order to pack them up, and ſend them on board ſhip; the Plaintiffs upon this ſent to him to know who was to pay for them: the Defendant ſaid, he had ſent them, and he would pay for them.

In conſequence of this, the carriages were packed up and ſent on board ſhip, and the bill was made out and delivered to the Defendant: he deſired time to look over it; and when the Plaintiffs clerk called a ſecond time, he ſaid the charges appeared very high; but deſired the clerk to call in a very few days, and he would ſettle it. Not having done ſo, Mr. *Phillipſon*, the Plaintiffs attorney waited upon him; when he ſaid he was told the bill was a moſt exorbitant one, and a fit ſubject to refer; he however

ſaid,

ſaid, he had the money to pay it, but did not ſay whether his own or Mr. *Copey*'s.

Upon this, *Beſt* Serjeant for the Defendant, contended, that there being no proof of the Defendant's having money of Mr. *Copey*'s in his hands to apply to the count in the declaration for money had and received, the Plaintiff muſt be nonſuited; and ſaid, it came exactly within the principle of *Matſon* v. *Wharam*, 2 Term Rep. 80; in which it was decided, that if the perſon who had the goods was at all liable, the undertaking of another muſt be in writing. The queſtion therefore was, Was Mr. *Copey* himſelf liable to the Plaintiffs? if ſo, the preſent action could not be ſupported.

He contended, that this muſt be taken to be the fact, as the bill ſent to the Defendant was made out in *Copey*'s name, and contained charges for work done by *Copey*'s own order; that every thing done by the Defendant was done in his character of agent to Mr. *Copey*; and there being no note in writing, he was not perſonally liable.

Lord ELDON ſaid, he was not diſpoſed to nonſuit the Plaintiff. In general caſes, to make a perſon liable for goods delivered to another, there muſt be either an original undertaking by him, ſo that the credit was given ſolely to him; or there muſt be a note in writing. There might, however, be caſes where this rule did not apply. If a perſon got goods into his poſſeſſion, on which the landlord had a right to diſtrain for rent, and he promiſed to pay the rent, tho' it was clearly the debt of another, yet a note in writing was not neceſſary: it appeared to apply preciſely to the preſent caſe. The Plaintiffs had to a certain extent

a lien upon the carriages, which they parted with on the Defendant's promiſe to pay: that, he thought, took the caſe out of the ſtatute, and made the Defendant liable for the amount of the bill.

The Plaintiffs had a verdict, ſubject to a reference with reſpect to the charges on the bill.

Bayley, Serjeant, and ——— for the Plaintiff.

Beſt, Serjeant, for the Defendant.

Vide *Williams* v. *Leper*, 3 *Burr.* 1886.

VINER, Adminiſtratrix, *v.* CADELL.

Where the wife of a bankrupt has adminiſtered to her father, and become poſſeſſed as adminiſtratrix of his effects, to which ſhe and infant brothers and ſiſters are entitled, and the huſband has continued the buſineſs of the father for their benefit, that is not ſuch a poſſeſſion of the goods as ſhall be deemed an ordering and diſpoſition within the ſtatute 21 Jac.

TROVER, for furniture taken by the Defendant, as meſſenger under a commiſſion of bankrupt, againſt one *Viner*, then deceaſed.

The Plaintiff, who was the widow of the bankrupt, was alſo adminiſtratrix to one *Lyons*, her father; and the goods in queſtion had been the property of *Lyons*, who had left the Plaintiff and three other children, all of whom were infants, except the Plaintiff.

The defence was, that the bankrupt took poſſeſſion of the houſe and the furniture claimed by this action, after *Lyons*'s death, and carried on the buſineſs of a baker, which *Lyons* had carried on in his life-time; and *Cockell*, Serjeant, contended, that this was an ordering and diſpoſition within the ſtatute 21 *Jac.* ch. 19, and was a juſtification to the Defendant for ſeizing the goods under a commiſſion againſt *Viner*.

Lord ELDON ſaid, the ſtatute did not apply to a caſe like the preſent, it only applied to caſes where the parties, whoſe property was in the bankrupt's poſ-

ſeſſion,

ſeſſion, were capable of aſſerting their claim; and not to thoſe in which the rights of infants were implicated: that it was every day's practice for the children of a teſtator or inteſtate to apply by petition to the Chancellor, where the property of their father had been ſeized under a commiſſion of bankruptcy, againſt his executor or adminiſtrator; that the aſſignees might account for whatever property belonging to their father, which the bankrupt had in *autre droit*, as executor or adminiſtrator, and which had got into their hands: that he ſhould therefore not hold this to be property ſubject to *Viner*'s bankruptcy, as far as reſpected the rights of the infant children.

His Lordſhip ſaid, he thought the Plaintiff had been ill adviſed in bringing the action, as it would not ſettle the rights of all parties. The Plaintiff, as one of the four children of *Lyons*, was entitled to one-fourth part of his property: that part perhaps ſhe aſſignees had a right to, ſhe being the wife of the bankrupt; but as ſhe was alſo adminiſtratrix of *Lyons*, if his eſtate was inſolvent ſhe could have no right to any part of it; the property muſt therefore be directed to be all converted into money, and *Lyons*'s creditors paid firſt. There were therefore, perhaps, in the preſent caſe, the rights of many perſons involved. Where a bankrupt was executor or adminiſtrator without any intereſt, his aſſignees could have no right whatever to any of the property in his poſſeſſion in his character of adminiſtrator or executor; but where he was intereſted with others in property, he would be tenant in common with them, and his aſſignees would ſtand in the ſame ſituation: and

his

his Lordſhip ſaid, he did not ſee how an action of *trover* could be maintained by one tenant in common againſt another; and until it appeared whether the Plaintiff was entitled to the whole property as adminiſtratrix of *Lyons*, in caſe the eſtate was inſolvent, or only to a ſhare of it, as one of *Lyons*'s children, to which the aſſignees would be entitled, as being the property of the wife of the bankrupt, he did not ſee how the action could be maintained.

It appeared that *Viner*, the bankrupt, was by trade a coachmaker, but had carried on the buſineſs of a baker (in which buſineſs the debt, which was the foundation of the commiſſion, had been contracted) for the benefit of the brothers and ſiſters of his wife, *Lyons* their father having been a baker. And *Beſt* Serj. for the Plaintiff, contended that, not having carried on buſineſs for his own benefit, he could not be a bankrupt.

Lord ELDON. That will not prevent him from being a bankrupt: an executor who carries on the buſineſs for the benefit of the teſtator's children, may be a bankrupt.

In order to prove that *Lyons*'s eſtate was inſolvent, *Beſt*, Serj. offered in evidence the account furniſhed by the Plaintiff, as adminiſtratrix in the Commons; to the truth of which ſhe had ſworn there: and he ſubmitted that, as he could not call herſelf as a witneſs, it was the next beſt poſſible evidence.

Lord ELDON thought it was not; but ſaid that if the Plaintiff's counſel deſired it, he would reſerve the point

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A verdict was taken for the Plaintiff; and Lord ELDON said he would consider the matter, and give his opinion the next day as to the best mode of setling the rights of the different parties, without compelling them to go into the court of Chancery.

Best, Serjeant, and *'Espinasse* for the Plaintiff.

Cockell, Serjeant, for the Defendant.

SIMMONS *v.* WILMOTT and others.

Same day.

Parish officers are bound to take care of casual poor; and if a person, not a parish officer, takes care of a person coming within that description, and for whom the parish officers would be liable to provide, he has a right to recover against them the expences incurred on such an occasion.

THIS was an action of assumpsit, against the Defendants, as churchwardens and overseers of the poor of the parish of *Isleworth*, for meat, drink, lodging, medicine, attendances, &c. found and given for one *Thomas Shaw*.

The case in evidence was, that *Shaw*, who was carter to a Mr. *Willan*, residing at *Marylebone Park* (not within the parish of *Isleworth*) had been thrown from the cart, within the parish of *Isleworth*, and severely bruised; so much so as to render it unsafe to remove him. He was brought to the Plaintiff's house, where he was kept and attended for ten days, until he recovered. For this, and money paid to the nurse, &c. the present action was brought.

Shepherd, Serjeant, in opening the case for the Plaintiff, stated it to be a question of very great importance, as it was to determine whether a person, not a parish-officer, who afforded relief to a person under

under the preſſure of immediate want, who came within the deſcription of caſual poor, could call upon the pariſh-officers to be reimburſed the expences he might have incurred in the neceſſary relief of ſuch perſon.

Before he went into the queſtion of their liability in point of law, without any expreſs promiſe, or direction to take care of the perſon requiring relief, he proved that when *Shaw* was brought to the Plaintiff's houſe, he (the Plaintiff) ſent to one of the overſeers, to inform him of it. The overſeer directed the perſon who brought the meſſage, to go to the beadle; and alſo deſired him to aſſiſt in taking care of the man. It appeared that *Shaw* was a weekly ſervant to Mr. *Willan*; and that after he had recovered, the Plaintiff applied repeatedly to Mr. *Willan*, to pay him for the expences incurred in taking care of *Shaw*; and ſent him in a bill amounting to 8*l.* 18*s.* 6*d.*: Mr. *Willan* offered him 5*l.* 5*s.* which he refuſed to take; and he then applied to the pariſh-officers, and ſent in a larger bill to them: it alſo appeared, that after the man had recovered, the veſtry had made an order, ſtating, "That as an encouragement to humanity, they had ordered *Simmons* five guineas; but, at the ſame time, proteſted againſt their liability to reimburſe him for the expences incurred, knowing *Shaw* to be a ſervant of Mr. *Willan*, and conceiving Mr. *Willan* liable; and the five guineas was merely voted as a voluntary donation, or reward for his humanity: this ſum the Plaintiff alſo refuſed to accept, and brought his action againſt the Defendants,

Defendants, as parish-officers, for all the expences incurred.

Lord ELDON. The questions in this case are, 1st, Whether *Simmons*, in point of law, has a demand against the parish-officers, either from the liability imposed upon them by law to take care of casual poor, or by express agreement? and, 2dly, Whether, having such demand, he has relinquished it, and bound himself to adhere to the demand he first made against *Willan* as the master of *Shaw*? The case is new to me. It has been decided, that if a servant in husbandry has received relief from the parish-officers, they cannot recover it against the master, as not being of that description of servants for whom the master is bound to provide; but that if he was of that description, the parish-officers could recover.—My Lord KENYON has ruled, that when a servant, living under the roof of his master, falls sick, the master is liable for medicines provided for the servant, if his illness has not been the consequence of his own misconduct or debauchery. If *Shaw* had been a servant of that description, *Willan* would have been liable; but it does not follow that because *Willan* might be liable, the parish-officers are thereby excused. It comes to this point, Was the person relieved, within the description of casual poor? If he was, the parish-officers are bound to take care of him: a common person would not; but if a common person does take care of him, on the liability of the parish-officers, I think he has a right to recover against them.

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With reſpect to the application, in the firſt inſtance, to *Willan*, the Plantiff might have reaſoned thus: "I will try to get the money from *Willan*, in order to relieve the pariſh." That alone will not diſcharge the pariſh-officers; there muſt have been ſome expreſs abandonment of his claim againſt the Plantiffs, and an admiſſion that he would look to *Willan* alone. He has acted imprudently, perhaps wrong, in ſending in a bill to the pariſh-officers larger than the one he ſent in at firſt to *Willan*; and he muſt be bound by the firſt bill; but even if you ſhould think 8*l.* 18*s.* 6*d.* too much, and that five guineas is ſufficient; if under all the circumſtances and the law, as I have ſtated it, you ſhould be of opinion that the pariſh-officers are liable, I think you muſt give a verdict for five guineas, notwithſtanding the order of veſtry; for I do not think the order of veſtry, proteſting againſt their liability, and offering it as a voluntary kindneſs, can be conſidered as a tender of ſo much.

Shepherd, Serjeant, and ——— for the Plantiff.
Cockell, Serjeant, and *Rain* for the Defendants.

CLEMENT *v.* MILNER *et alt.*

Friday, Feb. 21.

TRESPASS for taking a cow.

Juſtification by one Defendant, as owner of a field of turnips; and by the other as his ſervant, as a diſtreſs for damage *feaſant*.

To ſupport a juſtification for taking cattle as a diſtreſs for damage *feaſant*, if it appear that the party diſtraining had not actually got into the *locus in quo* before the cattle had got out of it, the juſtification cannot be ſupported.

It appeared in evidence that the cow had broke into a field of turnips belonging to the Defendant: a woman picking turnips in the field turned her out: the fences (which it appeared the Plaintiff was bound to repair) were in a very ruinous ſtate, and the cow returned; the ſame woman was about to turn her out again, when one of the Defendants being in an adjoining field, and ſeeing her endeavouring to turn the cow out, called out to her to ſtop, and ran towards the place where the cow was; the woman, not having heard him, turned the cow back into the Plaintiff's field, and ſhe had got back ſome way into the field before the Defendant came up; he followed the cow into the field, and called the other Defendant to his aſſiſtance; they drove her back into the Defendants field, and from thence to pound.

There was rather contradictory evidence as to the fact, whether the Defendant had actually got into the field where the treſpaſs was done, before the cow had been turned out of it, or not.

Lord ELDON in his addreſs to the jury ſaid, they were to conſider that fact. If the Defendant *Clements*, in the act of coming up, in order to diſtrain the

the cow, had actually got into the field where the cow was committing the treſpaſs, before ſhe had been turned out of it, the juſtification was proved; and they ſhould find a verdict for the Defendant. If they were of opinion that the cow was actually out of the *locus in quo* before the Defendant had got into it, though he might be in the act of approaching, in order to diſtrain her, they muſt find for the Plaintiff.

The jury found a verdict for the Plaintiff.

Cockell, Serjeant, and *Kyd* for the Plaintiff.

Clayton, Serjeant, for the Defendants.

Same day.

PRICE *v.* MESSENGER *et alt.*

The juriſdiction of magiſtrates cannot be tried in an action againſt their officers; and if the officers have a warrant, whether it is illegal or not, an action cannot be maintained againſt them for doing any thing ordered by the warrant, without a previous demand of a copy of it: *aliter*, if the acts complained of were not authorized by the warrant.

TRESPASS for taking goods, viz. ſugar, tea, nails, a caſk, and a bag; and for aſſaulting and impriſoning the Plaintiff.

Plea,—Not guilty, as to the taking the ſugar, and the aſſault and impriſonment; and admitting the taking of the reſt of the goods.

The Plaintiff was a grocer in *Coad's Road*, *St. George's Fields*.

The Defendants were runners to the police-office, *Queen-Square*, *Weſtminſter*.

Shepherd, Serjeant, in his opening, ſtated, that the action was brought againſt the Defendants as officers acting under a warrant.

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Lord ELDON interrupted him, and ſaid, if they acted under a warrant, the action ſhould not be againſt the officers, it ſhould have been againſt the magiſtrates who granted the warrant, or againſt the perſon upon whoſe information it was granted; whom the magiſtrates ought to give up.

Beſt Serjeant, on the ſame ſide, contended, that if the magiſtrates had no authority to grant the warrant, or if the warrant was to take particular goods, and the officers took other and different goods not mentioned in the warrant, they thereby exceeded their authority, and could not juſtify under the warrant.

Lord ELDON aſſented to the latter poſition, but ſaid, they could not try the juriſdiction of the magiſtrates in an action againſt the officers; the warrant, as far as it went, being a juſtification for them.

Cockell Serjeant, for the Defendants, objected: that the firſt ſtep in the cauſe ſhould be for the Plaintiff to prove a demand of a copy of the warrant.

Lord ELDON ſaid, the declaration did not charge the Defendants as officers. If they meant to juſtify under the warrant, the proof of that lay on them: when they came to that part of the caſe, the Plaintiff muſt prove a demand of a copy of the warrant.

It appeared that the goods had been carried to the police-office; and *Beſt* Serjeant, was proceeding to examine as to how long they had been detained there.

Lord ELDON ſtopped him, and ſaid, he could not go into evidence of any thing done after the goods had been brought to the office; the magiſtrates were anſwerable for that.

Officers are not liable for any injury done to property which they may have ſeized after they have brought it to the magiſtrates office.

The warrant was produced in evidence: upon which Lord ELDON referred to the ſtat. 24 *Geo.* II. ch. 44. and ſaid, that the magiſtrates not having been joined, there muſt be a verdict for the Defendants upon the production of the warrant; as the want of juriſdiction in the magiſtrates could not then be enquired into.

Shepherd Serjeant, ſubmitted, that if the warrant was manifeſtly, and on the face of it illegal, the ſtatute did not apply.

The warrant when produced appeared to be a warrant, ſtating that there had been lately ſtolen from ſome ſhip or ſhips, in the river Thames, a quantity of ſugar; and that there was reaſon to ſuſpect that the ſame was knowingly concealed or depoſited in the Plaintiff's premiſſes: it then authorized the Defendants to ſearch for the ſame; and if found, to bring it, and the perſon or perſons in whoſe cuſtody or poſſeſſion it ſhould be found, before the juſtices. The ſugars ſeized were not concealed, but expoſed in an open part of the ſhop.

The warrant was founded on the act 2 *Geo.* III. ch. 28. commonly called the Bum-boat Act, which authorizes magiſtrates to iſſue warrants to ſeize goods ſuſpected to be ſtolen from ſuch ſhip or ſhips; and it directs actions for any miſconduct in the execution of, or in granting ſuch warrants to be brought in *Middleſex:* and *Shepherd* Serjeant, then contended, that the warrant was not within the act; and that the officers had ſeized goods not authorized by the warrant. He further obſerved, that if the warrant was not according to that ſtatute, it muſt be taken to be founded on the general juriſdiction of magiſtrates;

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and therefore as the goods had been taken in the county of *Surry*, if the action had been brought in that county under the idea that the warrant had been iſſued under the general authority of magiſtrates to iſſue warrants to ſeize ſtolen goods, on production of the warrant, and proving that it was founded on the bum-boat act, the Plaintiff muſt have been nonſuited for not bringing his action in *Middleſex*; and, on the other hand, if founded on the general authority of magiſtrates, the offence having been committed in *Surry*, he muſt have been nonſuited for laying the *venue* in *Middleſex*, which would be a caſe of great hardſhip on the Plaintiff.

Lord ELDON admitted the conſequence that would follow, if the caſe was as *Shepherd* ſtated, but ſaid, he would not then decide the queſtion, whether the warrant was illegal or not; he would however aſſume that the warrant was wholly illegal; and in order to ſave the expence of a new trial, in caſe the court ſhould be of opinion that the warrant was a juſtification for the officers, and that a copy of it ought to have been demanded, he would direct the jury to aſſeſs damages ſeparately upon that part of the treſpaſs to which the plea of not guilty applied, and that which was admitted, with leave for the Defendant to move to ſet aſide the verdict, if a copy of the warrant ought to have been demanded.

The Plaintiff's counſel was proceeding to ſhew, that in conſequence of the goods being ſeized, and his having been apprehended, he had loſt his buſineſs, and had been much injured.

In an action againſt officers for ſeizing goods or impriſoning Plaintiff, he cannot go into evidence of any ſpecial damage, if he has brought an action againſt the perſon who gave the information on which

Bayley Serjeant, for the Defendants, interrupted the witneſs, and aſked if the Plaintiff had not

the officers acted, and which is then depending.

brought an action againſt *Naiſh*, the perſon who had lodged the information before the magiſtrates; and if ſuch action was not then depending.

Being anſwered in the affirmative, he objected to the Plaintiff's going into evidence of this ſpecial damage in an action againſt the officers, while he was ſeeking for redreſs for this part of the injury againſt another perſon.

Lord ELDON thought it would not be proper to admit ſuch evidence.

The goods had been carried to the magiſtrates office; and when it was diſcovered that the information had been ill-founded, the goods were reſtored, and the Plaintiff took away the ſugar and nails, but refuſed to take away the teas, as he had no permit to bring them back into his ſtock.

If goods which have been ſeized and brought to the magiſtrates office are afterwards reſtored, as having been ſeized illegally, and the party cannot remove them back without a permit, it is the duty of the magiſtrates to procure ſuch permit.

Lord ELDON ſaid, it was the duty of the magiſtrates to have procured a permit, and to have reſtored the goods, when they found they had been ſeized without proper cauſe. His Lordſhip in his addreſs to the jury obſerved, that the officers could not be juſtified in taking the tea and nails. If after they had come into the houſe, they ſuſpected there were other ſtolen goods in it beſides thoſe ſpecified in the warrant, and went back to the magiſtrates to inform them of their ſuſpicions, and the magiſtrates gave them only a verbal order to ſeize the goods, ſuch would not juſtify the officers in ſeizing them. His Lordſhip added, The warrant in the preſent caſe appears to be grounded rather on the old law, and the general juriſdiction of magiſtrates with reſpect to ſtolen goods, than on the bum-boat act. I will not, however, here decide whether it is illegal on the

face

face of it, or not; but for the purpoſe of ſaving the expence of a new trial, in caſe the court ſhould be of opinion that it is a legal one; or that at all events there having actually been a warrant, a demand of it was neceſſary previous to bringing the action, I will aſſume it for the preſent, as being no juſtification to the officers; and you will aſſeſs the damages ſeparately on that part of the treſpaſs which is admitted, and that to which the plea of not guilty applies.

The jury accordingly found a verdict for the Plaintiff for 30*l.* for taking the teas, nails, and caſk; and 70l. for ſeizing the ſugar, the aſſault and impriſonment, ſubject to the opinion of the court on the latter point.

Shepherd, Serj. *Beſt*, Serj. and *Lawes* for the Plaintiff.

Cockell, Serj. and *Bayley*, Serj. for the Defendants.

In the next term the Defendants moved to ſet aſide the verdict; and a rule was granted as to the 70*l.* which was afterwards made abſolute: the court being of opinion, that whether the warrant was legal or not, a demand of it was neceſſary, under 24 *Geo.* II. ch. 44. Vide 8 Bos. and Pull. 158.

Vide poſt, *Cooper et alt. v. Booth.*

Same day.

DAVIES *v.* RIDGE and others.

ASSUMPSIT upon an award, and for money had and received againſt the Defendants, as truſtees of a Mr. *Pigot*, of *Peplow* in *Shropſhire*. Truſtees by ſubmitting matters to arbitration, do not make themſelves perſonally liable.

The Plaintiff had been a judgment creditor for 9000*l.* part of which had been paid; and it

had been referred to arbitration, to aſcertain how much was really due upon the judgment. The arbitrators had made an award in favour of the Plaintiff.

Lord ELDON ſaid, the Plaintiff muſt ſhew the Defendant had effects of the truſt-eſtate; ſubmitting to arbitration did not make them perſonally liable.

Mr. *Ridge*, one of the truſtees, had admitted, that he had money of the truſt-eſtate in his hands; and *Lawes* for the Plaintiff, ſubmitted, that this admiſſion of one of them bound the reſt.

An admiſſion by one truſtee will not bind his co truſtees: *aliter*, where parties are perſonally liable.

Lord ELDON. It would, if they were all perſonally liable; but not where they are only truſtees.

Marſhall, Serjeant, and *Lawes* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

IN THE KING'S BENCH.
SITTINGS AFTER TERM AT GUILDHALL.

Saturday, Feb. 21.

RICHARDS *v.* BORRETT, Eſq.

ASSUMPSIT for money had and received.

Where deeds reſpecting real property have been depoſited as a ſecurity for an annuity, *e.g.* it implies an intention in the party depoſiting them to charge the real property, and gives the party with whom they are depoſited a lien on them.

The Defendant, being in the Fleet Priſon, and diſtreſſed for money, had applied (by means of one *Bryant*, an attorney) to the Plaintiff, to borrow ſome; the Plaintiff lent him ſome money, and took from the Defendant a bond and warrant of attorney, to ſecure an annuity.

Shortly after, the Defendant applied through the ſame channel to the Plaintiff, to borrow more money; the

the Plaintiff required a further ſecurity than a bond and warrant of attorney; and the Defendant depoſited with him the leaſe of a farm in *Kent*, which he repreſented as unincumbered; and it was endeavoured to be proved, that he meant to charge this real property with payment of an annuity for the latter ſum advanced; but the Defendant's counſel aſſerted that it was only depoſited with a view to ſecure the payment of the rent by the tenant in diſcharge of the annuity.

The proof not coming up exactly to that point, Lord KENYON ſaid, it had been held in equity, that depoſiting all, or even part of the deeds reſpecting real property, implied an intention of charging the real eſtates, and gave the party a lien upon them; and that as this was an equitable action, he would hold the ſame doctrine.

No memorial of the firſt annuity had been regiſtered, nor had any deed to charge the real property with the ſecond annuity been regiſtered; and the annuity having been in arrear, the preſent action was brought to recover the conſideration-money.

No application had been made to the court to ſet aſide the firſt annuity; and *Erſkine* for the Defendant contended, that the ſecurities were only voidable; and that being ſtill in exiſtence, the preſent action could not be maintained.

Lord KENYON thought the objection was well founded with reſpect to one annuity: the party ſhould be called upon to complete the ſecurities;

and thoſe for part having been completed as far as the party had been called upon, they muſt be conſidered as valid until ſet aſide by the court; but, with reſpect to the other, the Defendant not having done, or being unable to do, that which he had undertaken; namely, to charge the real eſtate, the Plaintiff was entitled to recover the conſideration-money of that annuity.

A verdict was found, by conſent, for the conſideration-money of both annuities.

Garrow and *Lawes* for the Plaintiff.

Erſkine and *Dampier* for the Defendant.

Vide *Weddel v. Lynam*, ante vol. 1, 309.

Same day.

HENNELL *v.* FAIRLAMB.

A party cannot bring an action for what has been the object of a ſet-off in a former action by the Defendant againſt him; but if the ſet-off was more than ſufficient to cover the demand in the former action, he may maintain an action for the ſurplus.

ASSUMPSIT for work and labour, as a warehouſeman.

Plea of the general iſſue, and notice of ſet-off.

The Defendant had brought an action in the court of Common Pleas againſt the preſent Plaintiff; to which the latter had pleaded a ſet-off, and had obtained a verdict in conſequence.

Lord KENYON. If the preſent demand was the object of the ſet-off in the former action, the preſent action cannot be maintained; the ſubject of it has been already diſpoſed of.

Garrow for the Plaintiff ſtated, that that demand in the former action was 7*l.* 2*s*; the ſet-off was 14*l.*

14*l.* 15*s.*; and that the preſent action was brought for the ſurplus.

Lord KENYON. That certainly may be done.

The Defendant had paid money into court ſufficient to cover the preſent demand; and had a verdict.

Garrow and *Jervis* for the Plaintiff.

Erſkine and *Lawes* for the Defendant.

MURRAY and another *v.* BUTLER.

ASSUMPSIT for money had and received, and on an account ſtated.

The' the Plaintiff's counſel may have ſet out with only claiming the balance of a ſettled account, if he fails in proving it, he ſhall not be precluded from going into evidence to charge the Defendant with money had and received to the Plaintiff's uſe.

Erſkine, in his opening for the Plaintiff, ſaid that the action was brought to recover the balance of a ſettled account, which the Defendant had admitted.

The witneſſes failing in proving a ſettled account, *Erſkine* was proceeding to examine, as to certain ſums of money which had come to the Defendant's hands; when he was interrupted by *Garrow*, who objected: That as he had ſet out with only charging the Defendant with the balance of a ſettled account, he ſhould confine himſelf to that.

Erſkine contended, that though he did ſet out with charging the Defendant with a ſpecific balance of money, having failed in proving that, he was not precluded from charging the Defendant with money belonging to the Plaintiff which had come to his hands,

hands, and letting him discharge himself as well as he could.

Lord KENYON thought he might do so, and suffered the cause to proceed.

The cause was afterwards referred.

Erskine and *Lawes* for the Plaintiff.

Garrow and ——— for the Defendant.

Monday, Feb. 24th.

ROGERS *v.* Mc CARTHY.

The slip of paper on which underwriters take down the risques they insure, is not such an instrument as an action could be maintained upon. In order to enforce an undertaking of this nature, it must be on a stamped policy.

ASSUMPSIT by the Plaintiff, an underwriter, against the Defendant, a broker, for money had and received for premiums on a policy of insurance on the ship *Thomas* and *Mary*.

The cause had been tried before, and the Defendant had paid 10*l.* into court. The Plaintiff submitted to a nonsuit, and afterwards took the money out of court. He had not moved to set aside the nonsuit, but brought the present action to recover the whole sum he had before claimed, except the 10*l.*

It was objected: That having taken money out of court after having been nonsuited, and never having moved to set that nonsuit aside, he was barred from bringing a new action.

Lord KENYON said, it was a question of great difficulty and importance; but seemed inclined to think it was a bar: his Lordship however said, he would

would not decide it at *Niſi Prius*, but would reſerve the point for the opinion of the court, and ſuffer the cauſe to proceed.

It was proved to be uſual for underwriters to put down upon a ſlip of paper the riſques they had taken in the courſe of the day; and it became important, in one ſtage of the cauſe, to aſcertain the time when the riſque in the preſent caſe had been taken, and the deſcription of the ſhip; and the ſlip was produced.

One of the jury (which was a ſpecial one) ſaid it was conſidered at *Lloyd's*, that the party was bound by that ſlip, though he never ſigned a policy; and that loſſes were frequently ſettled by perſons who had taken the riſque in that manner.

Lord KENYON ſaid, that however a man might be bound in honour and good faith, which was the ground-work of all mercantile tranſactions, he certainly would not be bound in law by ſuch an inſtrument. If he was to inforce his claim in a court of juſtice, he muſt produce a ſtamped policy.

A clerk of the Plaintiff's was called as a witneſs; and a book containing an alphabetical liſt of the riſques taken by the Plaintiff and the times when taken, was put into his hands: it was in his own hand-writing: and on his ſaying that he did not take thoſe entries from original documents, but copied them from entries made by the Plaintiff in a book, in his (the Plaintiff's) own hand-writing kept by him, *Garrow* objected to the witneſs making uſe of the book.

Erſkine

A witneſs may uſe a book containing entries not made from original documents, to enable him to ſtate the time when ſuch entries were made, but not ſo as to make ſuch entries evidence.

Erſkine ſaid, he did not want to make uſe of it to make the entries evidence; he only wanted it to enable the witneſs to ſtate that a particular entry had been made at a particular time.

Lord KENYON thought that it might be made uſe of for that purpoſe.

The Plaintiff had a verdict, ſubject to the opinion of the court on the point reſerved.

Erſkine, *Adam*, and *Warren* for the Plaintiff.

Garrow, *Gibbs*, and *Marryat* for the Defendant.

Tueſday, Feb. 25th.

ABEL and another *v.* SUTTON.

After the diſſolution of a partnerſhip, one of the perſons who compoſed the firm, cannot put the partnerſhip name on any negotiable ſecurity, even though ſuch exiſted prior to the diſſolution, or was for the purpoſe of liquidating the partnerſhip debts, notwithſtanding ſuch partner may have had an authority given him to ſettle the partnerſhip affairs.

THIS was an action brought by the Plaintiffs, as indorſees, againſt the Defendant as ſurviving partner of one *Poynter*, upon a promiſſory note for 685*l.* 11*s*, dated the 27th of *May* 1799, and payable in ſix months after date, drawn by Meſſrs. *Horton* and Co. in favour of *Sutton* and Co. and indorſed in the partnerſhip name of *Sutton* and Co. to the Plaintiffs.

The Defendant and *Poynter* had carried on buſineſs in partnerſhip, under the firm of *James Sutton* and Co. On the 31ſt of *May*, 1799, the partnerſhip had been diſſolved, and notice of the diſſolution publiſhed in the *London Gazette* of the firſt of *June*: and the defence was, That the note in queſtion was an accommodation one, created after the diſſo-

diſſolution of the partnerſhip, though it bore date before; and the partnerſhip name put on by *Poynter* alone, without authority from the Defendant; or that even if it exiſted prior to the diſſolution, it had not been put into circulation until after. The indorſement, "*James Sutton* and Co." was in the hand-writing of *Poynter*; and it appeared clearly that it had not been made until the 28th of *Auguſt*, nearly two months after the diſſolution of the partnerſhip; but it was ſtated, and admitted to be the cuſtom of trade, that when bills or notes had a long time to run, it was not uſual to put them into circulation until near the time they became due, or when they had about the uſual time of diſcountable ſecurities to run.

Law for the Plaintiffs contended, that where a partnerſhip had been diſſolved, and one of the partners had authority given him to ſettle and liquidate the partnerſhip accounts, and due notice to that effect was given (as in the preſent caſe in the ſame advertiſement in the Gazette, which contained notice of the diſſolution of the partnerſhip) ſuch partner had a right to uſe the partnerſhip name in negociating bills or ſecurities which exiſted previous to the diſſolution, until the accounts were liquidated: and Mr. *Barnewall*, one of the jury (which was a ſpecial one) ſaid, it was very cuſtomary for one partner to uſe the partnerſhip name long after it was notoriouſly diſſolved, in negociating the partnerſhip ſecurities, for the purpoſe of liquidating the partnerſhip accounts, and winding up the concern; and obſerved,

that

that many bills could not be received if the partnerſhip name was not upon them.

Erſkine for the Defendant ſaid, the declaration ſtated that *Sutton* and Co. indorſed the note; it muſt therefore be ſhewn that the partnerſhip exiſted at the time the note in queſtion was indorſed; and he cited *Dixon* v. *Evans*, 6 Term Rep. 57, in ſupport of this poſition.

Lord KENYON. If a fair bill exiſted at the time of the partnerſhip, but is not put into circulation until after the diſſolution, all the partners muſt join in making it negotiable. The moment the partnerſhip ceaſes, the partners become diſtinct perſons: they are tenants in common of the partnerſhip property undiſpoſed of, from that period; and if they ſend any ſecurities which did belong to the partnerſhip into the world, after ſuch diſſolution, all muſt join in doing ſo. I even doubt much, if an indorſement was actually made on a bill or note before the diſſolution, but the bill or note was not ſent into the world until afterwards, that ſuch indorſement would be valid.

Gibbs mentioned *Ellis* v. *Galindo*. *Dougl. App.* 20.

In the courſe of the cauſe a witneſs was called who had been clerk to *Poynter*. He was aſked if he did not know that *Poynter*, after the diſſolution of the partnerſhip, had put the partnerſhip name on bills antedated to a time previous to the diſſolution.

Law objected to the queſtion: he ſaid that it aſſumed as a fact that bills had been antedated, without ſhewing that ſuch in fact did exiſt.

Lord

Lord KENYON was clearly of opinion, that the queſtion was a legal one; and *Gibbs* mentioned the caſes of indorſements by procuration; in which it was every day's practice to aſk witneſſes, if bills had been indorſed by procuration, without producing any ſuch.

It had been proved, that *Poynter* had received money for ſecurities belonging to the partnerſhip, which had been thrown into the general fund, and had been applied in liquidation of the partnerſhip debts, after the diſſolution; — and *Law*, in his reply, ſtated two poſitions in ſupport of the Plaintiffs claim: 1ſt, That if bills exiſted before the diſſolution of the partnerſhip, and one of the partners had authority to ſettle and liquidate the partnerſhip accounts, ſuch partners had a right to put the partnerſhip name upon ſuch bills; and that a *bona fide* holder of ſuch bill would have a right to reſort to all the partners: 2dly, That if he put into circulation bills in the partnerſhip name, upon which money had been raiſed, which was applied in liquidation of the partnerſhip debts, it was money had and received to the uſe of all the partners, and all would be liable.

Lord KENYON (after obſerving that there was no evidence to ſhew that the money raiſed upon the bill in queſtion had been ſo applied) expreſſed his moſt decided diſſent to both poſitions: he ſaid, it could never be allowed that any one might make another his debtor againſt his will: by that means a man's greateſt enemy, by paying his debts, might make

make himſelf his creditor. The moſt miſchievous and diſtreſſing conſequences might enſue from ſuch a doctrine. He had often ruled that it could not be done; and he was ſtill of the ſame opinion. With reſpect to the other poſition, his Lordſhip ſaid, When a man takes a partner, he takes him for better, for worſe; he repoſes confidence enough, and places himſelf ſufficiently in the power of his partner during the partnerſhip. To contend that this liability, to be bound by the acts of his partner, extends to a time ſubſequent to the diſſolution, was, in his mind, a moſt monſtrous propoſition. A man in that caſe could never know when he was to be at peace, and retired from all concerns of the partnerſhip, if one partner was to have the power of binding another long after the diſſolution of the partnerſhip. I am of opinion, ſaid his Lordſhip, if a bill is ſent into circulation after the diſſolution of a partnerſhip, that beyond all controverſy, all the partners muſt join in the indorſement; and one by putting the partnerſhip name cannot bind the reſt.

The jury found a verdict for the Defendant.

Law, *Garrow*, and *Giles* for the Plaintiff.

Erſkine and *Gibbs* for the Defendant.

GREGORY *v.* HOWARD.

ASSUMPSIT on a promiſſory note.

Plea of the general iſſue as to all but 2l.; and as to that a tender.

When a cauſe is referred, the arbitrator may be called as a witneſs to prove facts admitted before him as arbitrator.

The parties had been concerned together in the purchaſe of a field of potatoes, and other dealings; and the defence was, that all accounts between them had been ſettled.

The Plaintiff called a witneſs who had been an arbitrator, to ſettle the accounts between the parties.

The counſel for the Defendant objected to the witneſs ſpeaking as to any communications made to him in the courſe of the arbitration.

Lord KENYON. I have often given my opinion on this ſubject. Evidence of conceſſions made for the purpoſe of ſettling matters in diſpute, I ſhall never admit; but facts admitted before arbitrators, I always ſhall; I ſhall, therefore, allow the arbitrator to be examined, and to ſpeak to ſuch matters of fact as were admitted by the parties before him.

Erſkine and *Jervis* for the Plaintiff.

Garrow for the Defendant.

February 21.

LACLOUCH *v.* TOWLE.

Where, by the cuſtom of the trade, a calico-printer is bound to take goods damaged in the printing, the mere circumſtance of their being damaged confers no ſuch property in them on him as to authorize him to ſell them, unleſs the owner has elected that he ſhould take them.

TROVER for a quantity of muſlins and calicoes.

To prove the property in the Plaintiff, the evidence was, that one *David Payne* was a calico-printer; that he received the goods from *Stacie* and *Macdoual* for the purpoſe of being printed. It appeared to be the uſage of the trade, that when goods were damaged in the printing, the printer was bound to take them; the goods in queſtion had been damaged, and were ſold by *Payne* to the Plaintiff, who proved the payment for them by a banker's check, and that it was cuſtomary to buy goods of this deſcription from the printer.

The Plaintiff employed a perſon of the name of *Fox*, as his agent, to diſpoſe of the goods: he delivered the goods to the Defendant, who was a warehouſeman, to look at, for the purpoſe of purchaſing them: he retained them for the right owner; it being ſuſpected that the tranſaction by which *Fox* became poſſeſſed of them was fraudulent.

The Plaintiff's counſel firſt contended, that the uſage being eſtabliſhed, the mere act of damaging the goods without leaving any election in the owner, conferred a property on the calico-printer.

Lord KENYON ſaid, that ſuch a propoſition could not be heard of; that it enabled the calico-printer by

by his own act to defraud the perſon employing him; that it ſhould be open to the election of the owner to ſay whether he would take the goods in their damaged ſtate, or not; and that unleſs his aſſent was given to the printer ſo diſpoſing of them, any ſale of them made by the latter ſhould be void.

Erſkine for the Plaintiff then contended, That the Defendant's having received the goods from the Plaintiff, could not defend himſelf by ſetting up a right of property in another, but was bound at all events to deliver them; and cited a caſe before Mr. Juſtice *Gould*, at *Maidſtone*, to the following effect: A carrier had a parcel of goods delivered to him, to be carried from *Maidſtone* to *London*. While the goods lay at his warehouſe, a perſon came there, who ſaid the goods were his, and claimed them from the carrier: the carrier ſaid, he could not deliver them; but that if he was indemnified he would keep them, and not deliver them according to order. An indemnity was given; and the goods not being delivered according to order, the party by whom they were delivered to the carrier, brought an action againſt the carrier. Mr. Juſtice *Gould* would not permit him to ſet up any queſtion of property out of the Plaintiff; and held, that he having received them from him, was precluded from queſtioning his title, or ſhewing a property in any other perſon.

If a carrier receives goods to be carried, he cannot retain the goods, and put the conſignor of the goods upon proof of his title to them.

Lord KENYON admitted the authority of the caſe cited as law, but that it did not apply to the preſent: that if the property of the goods was proved clearly to belong to other perſons, who had ſent them to *Payne* to be printed, that he ſhould hold it to be a deciſive anſwer to this action.

This was proved, and the Defendant had a verdict.

Erſkine and *Gurney* for the Plaintiff.

Garrow and *Marryatt* for the Defendant.

Same day.

KING *v.* FRANCIS.

Where the character of the Plaintiff or Defendant on the record is attempted to be impeached in the croſs-examination of the adverſaries witneſſes, if thoſe witneſſes deny the imputation intended to be conveyed, the party ſhall not be admitted to go into evidence of his character.

THIS was an action for adultery with the Plaintiff's wife.

In proving that the Plaintiff and his wife had lived happily together previous to the ſeduction, the counſel for the Defendant, in their croſs-examination, endeavoured to impute to the Plaintiff that he had been a diſſipated perſon, had ſold his furniture, and left his wife unprovided; but this was denied by the witneſſes who were examined.

Gibbs called a witneſs, to prove that the Plaintiff was an induſtrious man, and of good character: the admiſſibility of this evidence was oppoſed by the Defendant's counſel. The Plaintiff's counſel contended, that it was admiſſible; as though in general caſes, character was not matter of evidence, that in this action, the matters imputed to the Plaintiff went in mitigation of the damages, if not to the ground of the action; and as the Defendant had attacked the Plaintiff's character in the croſs-examination of his witneſſes, he ſhould be allowed the privilege

privilege of vindicating it, and reſtoring himſelf to credit with the jury.

Lord KENYON ſaid, That it was true in general, that at trials at *Niſi Prius*, the characters of the parties on the record was not matter to be examined into by evidence: that though the croſs-examination of the Plaintiff's witneſſes had been directed to impeach the character and conduct of the Plaintiff, he did not think that that authorized him to break through the rule of evidence, by going into evidence of character, as that character ſtood unimpeached by the teſtimony of the witneſſes examined, who had denied the imputation intended to be conveyed. He was therefore of opinion, that the evidence was inadmiſſible.

Verdict for the Plaintiff.

Gibbs and *Wathen* for the Plaintiff.

Erſkine and *Garrow* for the Defendant.

ARDING *v.* FLOWER and BLACKHALL, Sheriffs of *London*.

THIS was an action on the caſe, againſt the Defendants, as the ſheriffs of *London*, for an eſcape and falſe return.

A bankrupt is protected in his attendance on the commiſſioners, at a meeting for declaring a dividend after his laſt examination has been concluded, though only ſummoned verbally by the meſſenger.

The facts given in evidence were, that one *Chayter* being indebted to the Plaintiff in a ſum of 34*l.* he ſued out a bailable writ againſt him, which was delivered to the Defendants, the ſheriffs.

Chayter had become a bankrupt in the year 1795, ſubſequent to which the Plaintiff's debt accrued: his laſt examination took place in *January* 1796, in which year he obtained his certificate.

In the month of *October* 1799, a dividend was advertiſed of his eſtate; the bankrupt had been authorized to collect ſome of the debts due to his eſtate; he received a verbal notice from the meſſenger under the commiſſion to attend the meeting: he accordingly did attend the meeting purſuant to his notice, but he had no regular ſummons ſigned by the commiſſioners. While he was ſo attending, he was arreſted at the ſuit of the Plaintiff. He appealed to the commiſſioners, who interpoſed; and on their repreſenting to the officer that the Chancellor on a petition would commit him for a contempt, he permitted *Chayter* to go at large; and the ſheriff being called on for a return, returned *non eſt inventus*; for which this action was brought.

The Defendant's counſel relied, that the attendance on the commiſſioners was neceſſary and uſual, and that it afforded a protection from arreſt.

For the Plaintiff it was anſwered, that the ſtatute 5 *Geo.* II. ch. 30, under which only the bankrupt could claim an exemption from arreſt, privileged him for forty-two days only, or perhaps only until his laſt examination was finiſhed; but that even, was he protected during his attendance on the commiſſioners, it could only be where he attended under a regular ſummons ſigned by the commiſſioners; whereas here his attendance was purely voluntary.

Lord

Lord KENYON said, that the bankrupt was entitled to the protection of his person during his attendance on the commissioners acting under his commission; that he considered this protection as extending to all parties, and their witnesses attending on courts of justice; and as such he considered commissioners of bankrupt. With regard to the formality of the summons, he thought there was no ground of objection on that account, inasmuch as the bankrupt had had notice to attend from the messenger, and the commissioners had adopted his act.

Verdict for the Defendant.

Mingay and *Manley* for the Plaintiff.

Garrow and *Marryatt* for the Defendant.

Vide 8 Term Rep. 534. S. C.

IN THE COMMON PLEAS.
SITTINGS AFTER TERM AT GUILDHALL.

BEDFORD *v.* M^cKOWL.

February 25th.

THIS was an action on the case, for seducing the Plaintiff's daughter.

In an action on the case for seduction, *per quod servitium amisit*, the Plaintiff is not confined to proof of loss of service only, but may go into evidence of the loss of comfort in the security of her child, and injury to her feelings as a parent.

The Plaintiff kept an inn at *Colnbrook*; the daughter acted as bar-maid.

The Plaintiff's counsel were proceeding to examine witnesses as to the general good conduct of the Plaintiff's family, what other children she had, and how she was affected by the injury complained of.

Shepherd Serjeant, for the Defendant, objected to their going into evidence of this nature: he ſaid, the form of the action was for loſs of ſervice; and contended, that all the evidence ſhould be confined to the inquiry, how far the Plaintiff was damnified by the loſs of ſervice.

Lord ELDON. The Defendant's counſel object that all evidence except that which applies to loſs of ſervice is inadmiſſible. In point of form, the action only purports to give a recompenſe for loſs of ſervice; but we cannot ſhut our eyes to the fact, that this is an action brought by a parent for an injury to her child: in ſuch caſe, I am of opinion, that the jury may take into their conſideration all that ſhe can feel from the nature of the loſs. They may look upon her as a parent loſing the comfort as well as the ſervice of her daughter, in whoſe virtue ſhe can feel no conſolation; and as the parent of other children, whoſe morals may be corrupted by her example.

His Lordſhip ſummed up to the jury accordingly; and they found a verdict for the Plaintiff, with 400*l.* damages.

Cockell Serjeant, *Bayley* Serjeant, and *Wigley* for the Plaintiff.

Shepherd and *Beſt* Serjeants, for the Defendant.

COCHRAN *v.* RETBERG *et alt.*

Feb 26th.

THIS was an action of *aſſumpſit*, brought by the Plaintiff, who was captain of a ſhip, called the *Dempſter*, to recover a ſum of money claimed as the demurrage on a cargo of goods ſhipped on board the Plaintiff's ſhip on a voyage from the river *Elbe* to *London*.

Where there is a clauſe in a bill of lading, that the cargo ſhall be taken out in a certain number of days, or to pay demurrage, it means working days, not running days.

The declaration was on the bill of lading, which was in the uſual form, to pay the freight, &c. The clauſe reſpecting the demurrage was a memorandum in the margin of the bill of lading in the following words:—"To be diſcharged in fourteen days, or to pay five guineas per day demurrage." After the veſſel was diſcharged at the cuſtom-houſe, the Defendants paid the freight, &c. but reſiſted the payment of the demurrage, on the following grounds:—The ſhip arrived in the river *Thames*, and was reported on the 9th of *December*. If the fourteen days were to be counted running days, the demurrage commenced on the 24th of *December*; and the veſſel not being cleared till the 30th, the Plaintiff had of courſe a claim for ſix days demurrage: but it was contended that the word "days" generally, meant working-days, and did not include *Sundays*, or cuſtom-houſe holidays. The Defendants then proved, that the 21ſt of *December* (*St. Thomas*'s day) was a holiday; *Chriſtmas-day*, and the three following

following ones were alſo holidays; and during thoſe days, no goods could be landed at the cuſtom-houſe; but it was proved that on thoſe days goods could be taken out of the ſhip into the lighters.

Several witneſſes were examined as to the uſage whether the word "days," in the margin of the bill of lading, meant running days, or working days; and the evidence was contradictory as to that point.

Lord ELDON. This action is brought to recover a ſum of thirty-five guineas, which is claimed by the declaration, under a clauſe in the margin of the bill of lading: it is part of the ſpecial contract, and the Plaintiff has properly declared upon it as ſuch. As, however, there is a doubt reſpecting its meaning, it is capable of being explained by the uſage. If no evidence had been offered, but I was to decide on the clauſe itſelf, I ſhould have been of opinion that it meant running days: if that was ſo,—if evidence of uſage was not admiſſible, and the parties had made ſuch a contract, they muſt abide by it, even though they could not perform it; as if the veſſel had arrived on a holiday, and there had been holidays for the fourteen ſubſequent days.

As the law however ſtands, uſage may be admitted to eſtabliſh the meaning of the words uſed in the margin of the bill of lading; whether the word "days," uſed in it, means running days or working days. If this was the caſe of inland-trade, this muſt mean working-days, as the law of the country prohibits working on ſuch days as thoſe which

which formed part of the fourteen days claimed by the Plaintiff to be allowed by the bill of lading in this caſe; but, as the queſtion now ſtands, it is a matter of general importance to have the opinion of a ſpecial jury of the city of *London* on the uſage of trade, with reſpect to inſtruments of this deſcription. The words of the inſtrument are not "to be landed," but "to be taken out in fourteen days." She arrived on the 9th of *December*; the 15th was *Sunday*, and the 21ſt was an holiday. If the days are to be counted running days, it expires on the 23d; if theſe two days and the holidays at *Chriſtmas* are to be deducted, the goods being diſcharged on the 30th, it is in time.

The queſtion therefore reſolves itſelf into a queſtion of uſage; if it is left to the conſtruction of law, I ſhould be of opinion the Plaintiff ought to ſucceed: if the fact of uſage is clearly made out, tha the fourteen days mentioned in the bill of lading mean working days, that is a conſtruction which excludes *Sundays* and holidays at the cuſtom-houſe; there muſt be a verdict for the Defendant.

The jury found a verdict for the Defendant.

Beſt, Serjeant, and *'Eſpinaſſe* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

ANDERSON

ANDERSON *v.* PITCHER and WIFE.

If a ſhip is warranted to ſail with convoy from the place of rendezvous, ſhe muſt receive her ſailing inſtructions at that place, or the warranty is not complied with.

ASSUMPSIT for money had and received by the Defendant's wife before her marriage with the Defendant.

The action was brought to recover back the ſum of 284*l.* which had been paid by the Plaintiff, who had underwritten a policy on the ſhip *Golden Grove*, on a voyage to the *Weſt Indies*, in conſequence of the loſs of that ſhip; and which he now ſought to recover back, on the ground that he had paid a ſum of money which he was not bound by law to do, the ſhip not having complied with the warranty.

The circumſtances of the caſe were theſe:—The inſurance was effected on the ſhip at five guineas *per cent.* "at and from *London* to any of the ports, the *Weſt Indies*, *Jamaica*, and *St. Domingo* excepted, with leave to go to the place of rendezvous to join convoy, and warranted to ſail with convoy for the voyage."

The *Golden Grove* was to have ſailed with the fleet under Admiral *Chriſtian*. The ſhips were to rendezvous at *Spithead*. The *Golden Grove* arrived there about nine o'clock in the morning of the 13th of *November*; but the captain was not then on board; he was on ſhore at *Portſmouth*. At day-break, in the morning of that day, Admiral *Chriſtian* made the ſignal for ſailing, and got under weigh, but left the

the *Trident* frigate, Captain *Oſborn*, for the ſhips that did not weigh anchor with the Admiral: that on the 14th all the ſhips then at *Spithead* who applied for them, had their ſailing orders; on which day the captain of the *Golden Grove* enquired about ſailing orders, but found they could not be granted to him until the ſhip was in ſight. That the captain of the *Golden Grove* did not get on board his ſhip until one o'clock in the day of the 15th; at which time the *Trident* had got alſo under weigh: that both the Admiral's ſhip and the *Trident* were ſo far a-head, that the *Golden Grove* did not come up with them until between 11 and 12 o'clock on the 16th, when the captain went on board the Admiral's ſhip, and got his ſailing inſtructions. She was loſt two days after.

The counſel for the Plaintiff contended, that the ſhip having been warranted to ſail with convoy, that warranty had not been complied with, as at the time of her ſailing ſhe did not conſtitute a part of the convoy, from her wanting ſailing inſtructions; and that therefore the policy was void.

For the Defendant, it was relied upon by his counſel, that though he had not ſailing inſtructions, it proceeded not from negligence, but from inability to come up with the convoy on the 15th; but that ſhe actually had her ſailing inſtructions on board at the time the loſs happened, and during all the preceding time was under the protection of the convoy.

Lord ELDON. In this caſe the Plaintiff grounds his

his right to recover on the non-compliance of the assured with the warranty. If the warranty has not been complied with, the Plaintiff has paid his money by mistake, and may recover it back. The important words in the policy are, "with leave to go to the place of rendezvous and join convoy, and warranted to sail from thence with convoy for the voyage."

Vid. Hibbert v. Pigou, Park 339.

As the law stands, a ship cannot be said to sail with convoy, unless she has her sailing instructions on board. It will be therefore necessary, in this case, to inquire, 1st; Had she any sailing instructions? and, 2dly, When did she obtain them?

It appears that the *Golden Grove* did not obtain her instructions until the 16th. It is contended by the counsel for the Defendant, that if the captain is prevented by bad weather from obtaining his sailing instructions at the time of sailing, that it will satisfy the policy.—I think not. He is bound to be there in time to take in his sailing orders, or he does not comply with the warranty. When then was he bound to take in his sailing orders? At *Spithead*, where the fleet rendezvoused, and from whence it sailed. If therefore you are of opinion that *Spithead* was the place of rendezvous, she had not her sailing instructions on board at the time of sailing; and the law is clear that she had not complied with the warranty: the Plaintiff is entitled to recover.

The jury found for the Plaintiff.

Best,

Beſt Serjeant, and *Pell* for the Plaintiff.
Shepherd Serjeant, and *Giles* for the Defendant.

Vide 2 *Boſ.* & *Pull.* 164 *S. C.*

IN THE KING'S BENCH,
EASTER TERM 25 GEO. III.

[*The caſe of the Proprietors of the* Trent *Navigation v.* Wood, *which was decided by the court of King's Bench in* Eaſter *Term*, 25 Geo. *III. being referred to in the caſe of* Buller *v.* Fiſher, *ante* 67; *and that of* Cook *v.* Field, *ruled by Lord* KENYON *at* N. P. *ſittings before* Michaelmas *Term*, 1788, *in the caſe of* England *v.* Bourk, *ante* 80; *and the caſe of* Cooper *v.* Booth, *in that of* Price *v.* Meſſenger, *ante* 196, *and none of them, I believe, being in print, I inſert them in this place.*]

Proprietors of the TRENT Navigation *v.* WOOD.

THIS was an action of *aſſumpſit*.

The declaration ſtated that the Plaintiffs, as proprietors of the *Trent* Navigation, undertook to carry the Defendant's goods from *Hull* to *Gainſborough*: that in the river *Humber*, the veſſel, on board which the Defendant's goods were, ſunk, by driving againſt an anchor in the river; and the goods were,

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in conſequence of the accident, conſiderably damaged. That the Plaintiffs repaired the damage the goods had ſuſtained, and ſent them home to the Defendant: and the breach was, that the Defendant refuſed to pay the money the Plaintiffs had expended in the recovery of the goods. There was alſo a count in the declaration for money had and received, which was for freight. At the trial the Plaintiffs were nonſuited.

A rule having been obtained, to ſhew cauſe why the nonſuit ſhould not be ſet aſide, it came on to be argued on this.

The counſel for the Defendant being deſired to begin,—*Cowper* contended, that the Defendant was not liable to pay this money; there was no pretence to ſay that the accident happened from the act of *God*; for it was expreſsly ſtated and proved, that the accident was occaſioned by the negligence of the perſons on board a barge in the river, in not having his buoy out, to mark the place where his anchor lay. A great deal of evidence was adduced at the trial to prove this; but, as between the carriers and the owners of the goods, the miſconduct of a third perſon is immaterial, ſince a remedy lies over againſt the party ſo offending. The Plaintiffs would have been liable, had the goods been totally loſt; and therefore a *fortiori* ſhall anſwer this damage themſelves.

Bower, on the ſame ſide. The queſtion is, Whether the Plaintiffs as carriers, are liable for the damage done to the goods in queſtion? The law in all

all cases throws the burthen, when there is a loss, upon a common carrier, even if the goods are taken by robbery, where it is impossible for him to save them; and the reason is, to prevent any collusion between him and the thief. He is certainly liable in all cases, except the two, of accidents happening by the act of *God*, or of the King's enemies. Here is no pretence for either. A damage taking place by a natural accident that could not be foreseen, may be called the act of *God*; but this arose from the misconduct of a third person, and cannot therefore come within the meaning of that expression.

Bearcroft for the Plaintiffs. This is a question that concerns all common carriers; they are the *bailees* of goods; and as they get a profit by this undertaking, they are also liable to answer for losses, if the smallest degree of negligence is proved; but in the present case there was no possibility of seeing or knowing of the anchor that did the mischief, and therefore the accident happened from an inevitable necessity; which, though it may not come up to the precise idea of the act of *God*, is yet such a necessity as affords a justification to the Plaintiffs.

Plomer on the same side. There is no neglect proved on the part of the Plaintiffs; and as to the remedy over against a third person, it must first be determined who are immediately answerable for the loss, before it can be known who is entitled to this remedy. It was in evidence at the trial, that there is considerable danger in the voyage from *Hull* to *Gainsborough*,

borough, and that it is therefore uſual for the owners of the goods to inſure them; and as there was no inſurance in this caſe, but only the price of the freight, which has been paid into court, I contend that it was only a ſpecial acceptance on the part of the Plaintiffs, and therefore that they are not liable for the loſs occaſioned by the accident which has happened. It is like a voyage to the *Eaſt Indies*; and as there is a great riſque in all ſea-voyages, it would be very unreaſonable to make a party liable generally to anſwer the loſs where he has not ſtipulated for that purpoſe. The evidence at the trial of an uſage to inſure goods for this voyage, varies the caſe very much from that of a common carrier, where there is no inſurance; therefore, as it appears that there was a ſpecial acceptance in this caſe, the Plaintiffs are not liable to anſwer the damages done to the goods.

Lord MANSFIELD aſked, If there was any caſe which made diſtinction between a land and a water-carrier? And, none being mentioned, *Cowper* in reply, put a caſe of an *Eaſt Indiaman* in the Downs running down another veſſel; and ſaid that the owners of the veſſel run down, would certainly have an action againſt the other for the damage; and would alſo be liable as common carriers to their employers. That this accident happened in the river *Humber*, clearly *infra corpus comitatus*; and therefore was not a ſea-voyage. A cuſtom to inſure was certainly proved; but becauſe it is uſual, a man

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is not obliged to do it; and a carrier will be equally anſwerable. If a man pleaſes, he may inſure his goods by the *Cheſter* waggon; but if he does, ſtill the waggoner muſt be liable in caſe of a loſs.

Lord MANSFIELD. This is certainly a ſea-voyage. It is a general queſtion, and no caſe has been cited exactly in point; but it is clear that the carrier is liable in all caſes, except for accidents happening by the act of *God*, or by the king's enemies. The act of *God* is a natural neceſſity, and inevitably ſuch, as winds, ſtorms, &c. The caſe of a robbery is certainly very ſtrong, but not a natural neceſſity; and in this caſe there is an injury by a private man, within the reaſon of the inſtance of robbery; yet I think the carriers ought to be liable. There is ſome ſort of negligence here; for as the buoy could not be ſeen, there ſhould have been, on that account, a greater degree of caution uſed.

Willes Juſtice, of the ſame opinion.

Aſhhurſt Juſtice. The general rule is, that the carrier is liable in every inſtance, except for accidents happening by the act of *God*, or the king's enemies; but another rule is now attempted to be ſet up; which is, that the carrier ought not to be liable, where negligence is imputable to him; but no caſe has been cited to prove this doctrine; and I think that good policy and convenience require the rule to be adhered to which has hitherto prevailed. It will naturally lead to make carriers more careful in general. If this ſort of negligence were to excuſe the carrier, when he finds that an accident has happened to goods from the miſconduct of a third per-

ſon, he would give himſelf no farther trouble about the recovery of them; nor do I think that in this caſe the carrier is entirely free from every imputation of negligence. His not ſeeing the buoy ought to have put him upon enquiring more minutely about the anchor.

Buller Juſtice. This caſe is very different from thoſe relied upon by the Plaintiffs; two grounds have been made for the Plaintiffs: firſt, That upon general principles of law they are not liable: and ſecondly, That they are not liable, becauſe this was a ſpecial acceptance, which excluded the riſques of the ſea; but for this there is no colour at all. It was proved at the trial that it was uſual to inſure; but that does not ſhew that the carrier is not liable where there is no inſurance: the merchant is not bound to inſure, nor does that vary the obligation. Neither is it to be preſumed, that becauſe the price of inſurance is low, this riſque is excluded when not inſured: the carrier knows the degree of danger, and proportions his premium accordingly.

As to the general principle, there is no diſtinction between a land and a water-carrier. In the caſe of a robbery, the carrier is ſubject to force which he cannot reſiſt; yet he ſhall be liable. In this caſe, I think there was a degree of negligence in point of fact; but the negligence in point of law was ſufficient.

Rule diſcharged.

Vide *Forward* v. *Pittard*, 1 Term Rep. 27.

SITTINGS

SITTINGS BEFORE MICHAELMAS TERM 1788. CORAM LORD KENYON.

Cook v. Field.

THIS was an action for words, in themſelves actionable, with ſpecial damage laid.

The Defendant juſtified the truth of the words.

The Plaintiff proved no ſpecial damage.

Lord Kenyon obſerved, that every count in the declaration had a *per quod*, and ſeemed to doubt whether as the Plaintiff had proved no ſpecial damage, evidence of the words only would ſupport the declaration ſo framed; but upon its being ſuggeſted to him at the bar, that if the words were in themſelves actionable, it was not neceſſary to prove ſpecial damage; and that proving or not proving the *per quod*, made no difference, even as to coſts. His Lordſhip aſſented to the poſition.

Erſkine, for the Plaintiff, wanted to bring forward evidence as to converſations ſubſequent to the time of the commencement of the action; and ſaid, it was laid down in *Bull. N. P.* 7, that after having proved the words laid in the declaration, it was allowable to give ſuch evidence, to ſhew the malicious intention with which they had been ſpoken; but

Lord KENYON ſaid, that was with the exception of ſuch words as might be themſelves the objects of ſeparate actions.

The words ſtated in the declaration were, for charging the Plaintiff with being acceſſary to a felony; and *Beurcroft* laid it down as a principle, that though the principal thief had previouſly been acquitted of the felony, it would be competent for the Defendant in this cauſe to go into evidence to prove his guilt; becauſe what had paſſed between other parties could not affect him: and he mentioned it as a common caſe, that where the principal has been convicted, it is nevertheleſs on the trial of the acceſſary, competent to the Defendant to prove the principal innocent.

To both theſe poſitions Lord KENYON aſſented; and added, that where a Defendant juſtifies words which amount to a charge of felony, and proves his juſtification, the Plaintiff may be put upon his trial by that verdict, without the intervention of a grand jury.

The Plaintiff had a verdict with 500*l.* damages.

TRINITY TERM 25 GEO. III. K. B.

COOPER *et alt.* *v.* BOOTH.

THIS was a writ of error from the Common Pleas. It was an action of treſpaſs: the Plaintiff declared for breaking and entering his dwelling-houſe, burſting locks, &c. and rummaging and throwing about his goods. The Defendant pleaded the general iſſue, and the jury found a ſpecial verdict, to the following effect:

That *Booth*, the Plaintiff, in the original ſuit, was a dealer in tea in the city of *Weſtminſter*; that the Defendants *Cooper* and *Cameron* were officers of exciſe for collecting the duties on tea, &c.; that in *January* 1783, *Cameron* applied to the Commiſſioners of exciſe for a warrant to ſearch the houſe of *Booth*; that the Commiſſioners being ſatisfied with the reaſonableneſs of his ſuſpicion, did grant a warrant, impowering him and *Cooper* to enter into *Booth*'s houſe, and ſeize all run-tea which ſhould be there found fraudulently concealed; that the Defendants did, in conſequence of this warrant, in the day-time, enter into the Plaintiff's houſe, and broke open a lock, which the Plaintiff had refuſed to open, and rummaged his goods; but that they found no tea.

Judgment had been given for the Plaintiffs in the Common Pleas, and a writ of error on the judgment having been brought, it came on to be argued on this day.

Friday, April 29, 1785.

Wood, for the Plaintiffs in error. The queſtion is, Whether the officers are juſtified in what they have done, not having found any tea? and it will turn on the conſtruction of the 13th ſection of ſtat. 10 *Geo.* I. ch. 10, which enacts, "That in caſe "any officer, &c. ſhall ſuſpect that any tea, &c. is "fraudulently concealed with intent to defraud, &c. "upon oath made to the commiſſioners of exciſe, "ſetting forth the grounds of his ſuſpicion, it ſhall "be lawful for them to authorize the officer to enter "ſuch houſe by day or night, and if by night with "a peace-officer, and ſeize and carry away ſuch "goods;" and gives a penalty of 100l. upon thoſe who ſhall obſtruct the officer's ſearch.

I contend, from the words of the act, that the officers were juſtified in this caſe, though the ſearch was unſucceſsful: the act meant to impower an officer to ſearch upon reaſonable grounds of ſuſpicion. It would be ſtrange then, that an officer who acts upon reaſonable grounds ſhould be deemed a treſpaſſer, notwithſtanding any ſubſequent event may make him ſo; beſides, the legiſlature did not mean to impower him to proceed merely from his own diſcretion. The commiſſioners, or a juſtice of peace, as the caſe may be, are to exerciſe their judgment on the cauſes of ſuſpicion alleged, and grant the warrant, if they think fit; and therefore there is no danger in entruſting ſuch a power in the hands of

of the officer. If he does nothing in the exerciſe of it which exceeds the authority given him by the warrant, he cannot be a treſpaſſer; and in this caſe he has not.

The inconveniences to the revenue would be very great, if officers were not to be juſtified, though they find nothing in their ſearch. It often happens that the officer is reſiſted at the beginning, and the goods in the mean time removed; ſo that a man may have the beſt grounds of ſuſpicion, and yet may not find any thing to confirm him. It is manifeſt, from the mention of the penalty for thoſe that impede the officer, that the act meant to indemnify him throughout: an action of this ſort was never attempted where there was a reaſonable ground of ſuſpicion; the true ground of it is malice, and vexation on the part of the officer.

Lord *Hale*, 2. P. C. 150, ſays, the officer will be juſtified *in eventu* only: this is merely a *dictum*, and is unſupported by any authority. *Boſtock* v. *Saunders*. *Black*. Rep. 912, ſeems to have been determined upon this opinion of Lord *Hale*.

The writ of aſſiſtance, mentioned in ſtat. 12 *Car*. II. ch. 19. is general, and directed to all the king's ſubjects, requiring them to aid and aſſiſt in the collection of the king's duties; but that is no authority in the preſent caſe, for there the officer acts entirely upon his own ſuſpicion, without the intervention of any magiſtrate whatſoever.

If an hue and cry be raiſed, a man may juſtify the arreſt even of an innocent perſon. *Hawk*. P. C.

77.

77, and 2 *Hale*, P. C. 104; for the raiſer of ſuch hue and cry is anſwerable in damages to the party injured; and therefore *a fortiori*, the officer is juſtified here, where there were ſtrong grounds of ſuſpicion.

Lord MANSFIELD. *Boſtock* v. *Saunders* has not been acquieſced in; there have been contrary determinations: the diſtinction I have always taken is this, that to juſtify under a writ of aſſiſtance, the officer muſt find the goods he ſearches for; but a warrant will juſtify without. If there appear any malice or undue motives in the officer, he will undoubtedly be liable.

Plomer for the Defendant in error. The verdict ſtates, that the officer having a ground of ſuſpicion, went to the commiſſioners, and obtained a warrant; but it does not appear what the particular ground of the officer's ſuſpicion was.

The act of parliament requires that it ſhould be ſet forth; but as the officer did not ſtate it to the jury at the trial, the court cannot judge whether the ſuſpicion was well founded or not. It was ſaid in *Boſtock* v. *Saunders*, that if the officer had given in evidence any circumſtance to prove a reaſonable ground of ſuſpicion, he would have been juſtified.

Buller Juſtice. It has been reſolved by a majority of all the judges, that the officer is not obliged to declare the grounds of his ſuſpicion, leſt accidents ſhould happen to him.

Plomer. It was thought in *Boſtock* v. *Saunders*, that the officer ought at the trial to produce in evidence the grounds of his ſuſpicion.

Arguments

Arguments of convenience and policy ought to have as much weight on one ſide as the other. The ſafety and peace of the trader ought to be conſidered; and it would be monſtrous to permit his houſe to be ſearched at all hours by an officer who will not declare his reaſons for ſuſpecting him. The arguments from an analogy do not apply to the caſe, and the warrant is not alone ſufficient to bar this action.

I contend, firſt, That when a warrant is granted to the party immediately applying for it, it is not enough as a juſtification to ſay that the warrant was granted, but it is neceſſary to ſtate the grounds upon which it was granted.

Secondly, Whenever an authority is given by perſons holding a limited juriſdiction, then it is always neceſſary to juſtify the act, by ſtating the particular authority upon which it is grounded.

1ſt, If an execution is to be executed againſt one who is party to the ſuit, it is enough to ſhew the writ; but if againſt a third perſon, it is neceſſary to produce the judgment upon which it iſſues. There muſt be a complete juſtification, or elſe the act will be a treſpaſs; for an incomplete juſtification is as none at all; and therefore the queſtion is, Whether the juſtification ſet up in this caſe is complete?

Mr. *Wood* ſays, *Hale* cites no authority for his opinion; but his *dictum* is an authority of itſelf. He ſays that the officer is juſtifiable if goods are found; if not, that the party who made the ſuggeſtion is puniſhable. From this it is clear that he took a diſtinction between the perſon executing the warrant, and

and the perſon applying for it. In the caſe of the writ of aſſiſtance, every body is commanded to aſſiſt, and therefore ought to be under the ſame protection as the officers themſelves; but it has been determined, that any one acting under it, is liable to make ſatisfaction *in eventu* to an innocent perſon.

Secondly, There is a diſtinction between warrants iſſued by magiſtrates having a general, and thoſe who have only a limited juriſdiction.

The commiſſioners have a very extenſive authority, and therefore the courts have confined them very ſtrictly in the exerciſe of it; and if an officer juſtifies under the act, he muſt bring himſelf in every reſpect under the deſcription pointed out by the ſtatute, and therefore producing the warrant is not ſufficient; he muſt go into all the particulars which give validity to it: *Nichols* v. *Walker*, Cro. Car. 394. This was the caſe of a diſtreſs made by a pariſh-officer in a place that maintained its own poor; and the court ſaid, "The warrant will not excuſe, becauſe the juſtices have but a particular juriſdiction, and therefore different from the caſe of a warrant iſſued by virtue of a general juriſdiction:" ——— v. *Boucher*, Cro. Jac. 81: *Terry* v. *Huntingdon*, Hard. 480, are to the ſame effect. From theſe caſes, I contend that the officer was bound to ſhew the cauſes of his ſuſpicion, that they might appear upon the general iſſue to be reaſonable under ſtat. 7 *Jac.* I.

The officer being in this caſe the firſt mover of the buſineſs, ſtands in the ſituation of perſons applying

plying upon their own ground; and is very different from the caſe of one not privy to the whole of the tranſaction. Upon theſe reaſons, I contend that the officer ought to have put in iſſue the grounds of his ſuſpicion, as he derives his power from a limited authority.

Unleſs this action can be maintained, no other can; for an action on the caſe will not lie, as the injury is immediate; therefore the court muſt now determine the broad queſtion, Whether the officer by force of his ſuggeſtion to the commiſſioners, behind the back of the trader, is to be juſtified in entering his houſe at all events? and whether he is to be without a remedy? for it is clear, that if an action is not to be ſupported againſt the officer, it cannot be ſupported at all.

Lord MANSFIELD aſked, If any inſtance was remembered by the bar, where an action was brought againſt the officer, no goods having been found;—but nobody recollecting any,

Wood in reply ſaid, That as to the objection that no grounds of ſuſpicion were ſtated by the officer, the act never meant that this ſhould be enquired into by a jury; for the commiſſioners are expreſsly empowered to judge of the reaſonableneſs of ſuch ſuſpicion.

The arguments of convenience are anſwered by the act of parliament. The legiſlature has thought fit to empower the officer to enter the houſes of tradeſmen by day or night; and the commiſſioners from whom he is to derive his authority, are made the judges of the cauſes of ſuſpicion.

It

It has been objected alſo, That the proceedings whereby the houſe becomes liable to be ſearched, are behind the back of the party; but if he was to be ſummoned, it is notorious that this would defeat the purpoſes of the ſtatute.

The caſes cited do not apply. The officer is in general juſtified by his warrant, and here there is ſomething tantamount to a judgment; namely, the judgment of the commiſſioners, upon the grounds of ſuſpicion offered to them. In the caſe of the writ of execution, the officer need not ſhew the party the grounds upon which the writ iſſues; and this caſe is ſimilar.

In the next, with regard to the rate, the place where the diſtreſs was made was extra-parochial, and therefore out of the limits of the juriſdiction of the officer; but that is not ſo here; for the verdict ſtates, that the houſe where, &c. was within the limits of the commiſſioners of exciſe.

In the third caſe, the plea was defective; for nothing was ſhewn which brought the matter within the juriſdiction of the magiſtrate. Had the officer here alleged generally divers grounds of ſuſpicion, there would have been ſome analogy between the caſes; but he ſtates his particular grounds purſuant to the act.

In *Terry* v. *Huntingdon*, the commiſſioners had exceeded their juriſdiction; but that was not the caſe here.

Another objection is, that the officer ought to have ſtated his cauſes of ſuſpicion, as they were traverſable, and ought to have been tried by the jury; but

but upon the true meaning of the act, this is not a queſtion traverſable or triable by a jury, as the magiſtrate is empowered to judge, and to grant the warrant in his own diſcretion.

Here there is ſomething more than the mere naked warrant ſtated; for it appears by the verdict to have been granted upon ſome ground; namely, the oath of the party applying.

Mr. *Plomer* ſays, that it is impoſſible to bring any other action than this; but if the information is found to be falſe or malicious, it may be the ſubject of an action upon the caſe, againſt the perſon who makes the ſuggeſtion; for it is certain, that wherever the authority of the law is perverted and abuſed, an action of this kind is maintainable; but nothing of this ſort appears upon the ſpecial verdict.

The court took time to conſider; and Lord MANSFIELD deſired the counſel to ſee if there was any authority in the books for the *dictum* of Lord *Hale*, above mentioned; and whether it had been ever held that an officer was liable to an action of treſpaſs after an unſucceſsful ſearch.

Upon the day after, *Plomer* mentioned a caſe in 2 Wils. 291, &c. State Trials, 321, as ſomewhat in point with the *dictum* of Lord *Hale*. *Thurſday, June 9.*

Lord MANSFIELD delivered the opinion of the court to the following effect:

This caſe comes before the court by writ of error from the Common Pleas; the judgment there was upon ſpecial verdict; and upon the ſpecial verdict the caſe appeared to be exactly the ſame with that of *Boſtock*

Boſtock v. *Saunders*, in *Blackſtone* and *Wilſon*'s Reports; and as upon the caſe the court of Common Pleas in this cauſe gave judgment, without hearing it argued, there is no occaſion to ſtate the caſe found by the verdict, becauſe it is the ſame as in *Boſtock* v. *Saunders*; there is no difference as to the facts of the caſes; both are truly ſtated.

The great authority of thoſe who gave the opinion has made us deliberate, and turn the matter over and over again in our thoughts; but after all the deliberation we have taken, we cannot bring ourſelves to concur in it.

We think the exciſe-officer cannot be guilty of a treſpaſs, either as procuring or executing this warrant. If he procured or executed this warrant maliciouſly or corruptly, on the ground of ſuch motives, he would be liable to a ſpecial action on the caſe.

The queſtion depends entirely upon an act of parliament, the 10th *Geo.* I. ch. 10. ſect. 13. By that act, a duty is impoſed upon an officer of exciſe who has grounds of ſuſpicion, to lay ſuch grounds upon oath before a proper magiſtrate deſcribed in the act; namely, a commiſſioner of the exciſe in town, and a juſtice of peace in the country. A duty is alſo impoſed upon ſuch magiſtrate, to exerciſe his judgment upon the grounds of ſuſpicion; and if he thinks them ſufficient, and not otherwiſe, he is bound to grant a warrant.

The judgment of the magiſtrate upon an *ex parte* repreſentation, warranted by oath, is deciſive, as to the iſſuing the warrant to ſearch. The commiſſioners

ers undoubtedly had authority in this caſe: the warrant is clearly legal when it is iſſued; the execution is clearly legal when it is executed; and it ſeems a ſoleciſm to ſay that the regular execution of a legal warrant can be a treſpaſs, though a bad motive in doing a legal act, or in executing a legal proceſs, might be actionable, as I have before ſaid in reſpect of ſuch motive.

Two objections have been made: firſt, That the event of not finding ſuch goods as are ſearched for, avoids the warrant, in reſpect of the exciſe-officer; and he ought to be conſidered as a treſpaſſer by relation, acting under no authority.

This repeals the act of parliament: the act is entirely adapted to the caſe of *probable* circumſtances; the objection requires *poſitive certainty*; the officer does not ſay that he knows that goods are in the houſe, but that he ſuſpects that they are. If a man by warrant is arreſted for ſuſpicion of felony, it is not neceſſary that he ſhould be found guilty on his trial, in order to juſtify the arreſt.

The writ of aſſiſtance is not applicable here; it is no warrant; it is general, and leaves all and every part of the execution of it to the diſcretion of the cuſtomhouſe-officers; and there is a poſitive clauſe which is material in the act of *Car.* II. and which makes the juſtification depend upon the event of finding the goods, ſuppoſe a warrant in the caſe of ſtolen goods, and the juſtification to depend on the event of finding them. It is a poſitive condition to prevent abuſes, that the procurer ſhall run the riſque

of the ſecret; and it was introduced with a political view, to prevent improper conduct in the officers, and not a conſequence drawn from principles; but we give no opinion upon this point: the act upon which the preſent queſtion depends, was made expreſsly for the good of the public, that the parties might proceed ſafely upon reaſonable grounds of ſuſpicion; and the check againſt abuſes is in the firſt inſtance the judgment of the magiſtrate: for ſuppoſe the goods actually in the houſe when the information was given, and taken out of it juſt before the warrant was executed, is it poſſible to ſay that the exciſe-officer, within the meaning of the act, can be a treſpaſſer? It is adding a clauſe which the legiſlature purpoſely avoided, with the example of ſuch a proviſion in the 12 *Car.* II. before their eyes.

The ſecond objection is, That if it is too much to ſay the validity of the warrant depends upon the finding of the goods or not, yet that the grounds of ſuſpicion muſt be laid before, and the ſufficiency of them made appear to the jury who are to try the cauſe.

This equally repeals the act; the exciſe-officer may be the only perſon who knows from whence his ſuſpicion ariſes, and he cannot in an action againſt himſelf give in evidence a reaſonable ſuſpicion; reaſonableneſs of ſuſpicion would have ſo much latitude to a jury, that no officer would be ſafe: the act was made to remedy theſe inconveniences; the oath of the officer is made evidence of the truth of the fact; and the probability of the ſuſpicion duly left to the magiſtrate

magiſtrate to judge of. If the magiſtrate thinks the ground of ſuſpicion ſufficient; the warrant ought to iſſue; if not, it ought to be refuſed.

The regulation made by the act is agreeable to the principles of juſtice and policy; the officer is not merely a party (though intereſted if the goods are found) but he acts as a public officer in the execution of his duty; and if he acts *bona fide*, he ought to be ſaved.

This act points out the way in which he may be ſaved; he muſt ſwear to the grounds of his ſuſpicion, take the opinion of the magiſtrates as to their ſufficiency, and obtain a warrant to authorize the ſearch. It is not left to the diſcretion of the officer; but there are ſeveral ſteps which would be neceſſary if it was requiſite, either that the goods ſhould be found, or that the officer ſhould be obliged to produce the grounds of his ſuſpicion before a jury. Where an officer acts *mala fide*, the act will not protect him; he is puniſhable by an action upon the caſe, and therefore we cannot help being of opinion, though we differ from great authority, that he is not a treſpaſſer; that the execution of a legal warrant is not a treſpaſs, but that the party injured muſt bring his action upon the grounds of bad motives; for this is an action of treſpaſs, and not an action to try whether he acted from bad motives or not; therefore the judgment of the court of Common Pleas muſt be reverſed.

Judgment reverſed.

By

By this determination the case of *Bostock* v. *Saunders*, 3 Wils. 434, was overruled: the authority of it has since been recognized. Vide 1 Term Rep. 535; and 2 *Bosanq.* and *Pull.* Rep. in *C. P.* 160.

CASES

ARGUED AND RULED

AT NISI PRIUS,

HOME CIRCUIT.

LENT ASSIZES
AT KINGSTON, 40 GEO. III.

BENTON, *one*, &c. *v.* GARCIA.

March, 1800.

If an attorney brings an action against a client, and part of his demand is for money advanced to his client's uſe, and the remainder for buſineſs done, which requires a bill to be delivered, and no bill has been delivered, he ſhall not be allowed to divide his demands at the trial, and recover for the money advanced.

THIS was an action of aſſumpſit, brought by the Plaintiff, who was an attorney. The declaration was for work and labour, money paid, with the other common counts.

The action was brought to recover a ſum of 9*l.* 18*s.* 10*d.*

The circumſtances of the caſe were theſe:—The Defendant having been arreſted at the ſuit of one *Wylie* in his life-time, had been liberated on giving his warrant of attorney, payable by inſtallments. *Wylie* died, and an inſtallment being in arrear, *Read* and *Copland* his executors, entered up judgment on the warrant of attorney, and took the Defendant in execution for the whole ſum unpaid, amounting to 25*l.* beſides poundage, &c. While

he was ſo in cuſtody, he employed the Plaintiff as his attorney, to effect his diſcharge. He took out a ſummons before a Judge; and by conſent an order was made, that the Defendant *Garcia* ſhould be diſcharged out of cuſtody, on payment of the inſtallment then due and the coſts; and the judgment to ſtand as a ſecurity for the future arrears.

The order being drawn up, *Read* and *Copland*'s attorney gave him the amount of their demand as follows; *viz.*

	£.	s.	d.
Inſtallment — —	1	18	6
Coſts of judgment —	3	3	0
Ca. ſa. Warr. &c. —	0	15	0
Attending ſummons —	0	3	4
	£. 5	19	10

Garcia, the Defendant, being unable to pay this ſum, the Plaintiff, in order to liberate him from confinement, paid this ſum for him, and he was accordingly diſcharged; the Defendant having previous to his diſcharge, ſettled the amount of the ſum in which he was indebted to the Plaintiff, being the above ſum of 5*l.* 19*s.* 10*d.* together with 1*l.* 11*s.* 6*d.* coſts due to the Plaintiff, for attendances on the Judge, and other buſineſs done in procuring the Defendant's diſcharge; which ſum the Defendant promiſed to pay, together with a ſum of one guinea as a gratuity to the officer.

This money not being paid, the Plaintiff ſued out a writ againſt the Defendant, without having delivered any bill.

A ſummons.

A ſummons was taken out for a particular of his demand; when he gave in the following:—

Read v. *Garcia.*	£.	s.	d.
Paid inſtallment and coſts to Plaintiff's attorney	5	19	10
Coſts for procuring your diſcharge	1	11	6
Officer	1	1	0
Poundage	0	5	6
Gratuity	1	1	0
	£. 9	18	10

The counſel for the Defendant contended, that the Plaintiff ſhould be nonſuited, on the ground of no bill having been delivered; that by the words of the ſtatute, 2 *Geo.* II. ch. 23. ſect. 23, "no attorney can commence an action for the recovery of any fees, charges, or diſburſements, at law or equity, until one month after the delivery of a bill, ſigned as directed by the ſtatute;" that the demand in this caſe, was money paid as a diſburſement in a cauſe of *Reed* v. *Garcia*, and ſo was within the ſtatute; and cited *Winter* v. *Payne*, 6 Term Rep. 645.

For the Plaintiff it was contended, that this caſe was not within the ſtatute; that it was for money paid to the uſe of the Defendant to the Plaintiff's attorney in that action, and which the maſter could not tax, as it was a groſs ſum upon which he could exerciſe no diſcretion; and that the ſtatute only required the delivery of ſuch bills as could be taxed. The caſe of *Winter* v. *Payne*, was for drawing and engroſſing an affidavit of debt, which was the commencement

of a cauſe; that the Defendant having ſettled the account with the Plaintiff, and admitted the demand, the Plaintiff might recover in the count for an account ſtated; but that, at all events, ſuppoſing the part for buſineſs done was rejected, on account of no bill having been delivered, the Plaintiff might recover on the count for money paid to the Defendant's uſe.

HEATH, Juſtice. I am of opinion that the objection ſhould prevail to the Plaintiff's recovering in this action; the Plaintiff might have ſplit the action, and ſued for the money paid to the Plaintiff's uſe only; but he has joined it with a demand made as an attorney, and that makes it neceſſary that the bill ſhould have been delivered. If a bill had been delivered, the Defendant would have had the month to conſider, whether he would not admit the part of the demand for the money advanced, and tax the bill. The caſe of *Winter* v. *Payne* is in point. He now cannot ſplit his demand, as that would be multiplying actions: and having joined the demands and the delivery of the bill being neceſſary for part of it, he muſt be nonſuited.

Beſt, Serjeant, and *Lawes* for the Plaintiff.

Garrow and *Onſlow* for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

KING'S BENCH,

EASTER TERM, 40 GEO. III.

SITTINGS AFTER TERM.

LOVELL *v.* SIMPSON.

May 29th.

THIS was an action of debt under the ſtatute 32 *Geo.* II. ch. 28, brought by the Plaintiff to recover from the Defendant, who was a ſheriff's officer, the amount of ſeveral penalties given by that ſtatute, for taking more money on an arreſt than is allowed by that act.

In actions of debt, to recover the penalties againſt a ſheriff's officer for taking more than is allowed by act of parliament on an arreſt, if the Plaintiff fails in proving his caſe ſo as to entitle himſelf to the penalties, he may recover on the count for money had and received, the overplus paid above what is allowed by the ſtatute.

The Plaintiff gave in evidence, That having been arreſted by the Defendant on a writ marked for bail for 500*l.*, he gave bail to the ſheriff; that the Defendant charged five guineas for the bail-bond and civility money; and that two guineas and a half were actually paid.

By the ſtat. 32 *Geo.* II. ch. 28, the officer is allowed to take the ſum of half a guinea for the bail-bond, and no more.

The declaration contained the common money-counts in debt, for money had and received, and money paid, as well as the counts for the penalties.

The Plaintiff having omitted to ſubpœna the witneſs to the bail-bond, and the extortion being laid to have been committed in taking the money for the bail-bond, in all the counts for the penalties, the Plaintiff was under the neceſſity of abandoning thoſe counts. His counſel then propoſed to go on the count for money had and received.

Mingay, for the Defendant, contended, that the Plaintiff ſhould be nonſuited, and not be permitted to go into evidence on the money-counts. That the action having been brought for the penalties for the breach of a ſtatute, and the Plaintiff having failed in eſtabliſhing the offence, ſhould not be allowed to go for the money taken by the officer, in the form of money had and received; inaſmuch as the money, if improperly or illegally taken, ſubjected him to the penalties which the Plaintiff had failed in eſtabliſhing.

Lord KENYON ruled, That the Plaintiff might recover on the money-counts; that it was money extorted from the Plaintiff, by the Defendant taking an advantage of his ſituation, and under a claim of right, which the Plaintiff was unable to reſiſt. That the claim aroſe under a ſettled rule of law, which entitled a party to recover back money extorted from him, which was the caſe here; and the circumſtance of the Defendant's thereby incurring a penalty, could not vary it.

Verdict

Verdict for the Plaintiff for the money paid, deducting the ſum allowed by law to the Defendant.

Erſkine and *Onſlow* for the Plaintiff.

Mingay for the Defendant.

Long v. *Moore*, Sittings after Hilary Term at *Guildhall*, *Feb.* 18, 1790. Aſſumpſit by the indorſee of a bill againſt an acceptor; after the acceptance, the word "date" was inſerted in the place of "ſight;" in which form it had originally been drawn. The acceptor being thereby diſcharged, the Plaintiff wanted to go on the common counts, and offered in evidence another bill, drawn by the ſame drawer on the Defendant, for the ſame amount, but not accepted. Lord KENYON ruled, that it could not be done; nor could the Plaintiff recover at all againſt the acceptor (the Defendant) for he was liable only by virtue of the inſtrument; which being vitiated, his liability was at an end.

CLARKE *v.* BRADSHAW and COGHLAN.

May 30th.

ASSUMPSIT for money paid, laid out, and expended to the Defendants uſe.

Where money has been paid on account of two Defendants, an acknowledgement by one within ſix years, ſhall prevent the ſtatute of limitations from attaching as againſt the other. *Quere?*

Pleas,—1ſt, The general iſſue; and 2dly, The ſtatute of limitations, by the Defendant *Bradſhaw*.

The Defendants had formerly carried on buſineſs as merchants, in *Cork*, in *Ireland*; and had become bankrupts. While they carried on trade, the Plaintiff had given his guarantee to Meſſrs. *Hamerſly*, the bankers, to ſecure any advances made to the Defendants in conſequence of their intercourſe with

England. The bankers had made advances for their uſe, to the amount of 1800*l.*; but the Plaintiff had not been called upon on his guarantee, until after the bankruptcy of the Defendants, when he paid the money, and now brought his action againſt them for money paid to their uſe.

Coghlan, one of the Defendants, let judgment go by default; and the Plaintiff relied upon a letter written by him in the courſe of the preceding year, as containing promiſes to pay, and an acknowledgment ſufficient to bind *Bradſhaw*, the other Defendant.

Gibbs, for the Defendant, contended, that this promiſe was of no avail, as it was made at the time when the Defendant was a bankrupt; and that, at all events, it could not bind the other Defendant.

Erſkine. This was a debt contracted by the two Defendants while in partnerſhip, and on their joint account. In the caſe of *Whiting* v. *Whitcomb*, *Doug.* 629, it was held, that in an action on a joint note, and the ſtatute of limitations pleaded, a promiſe by one of the parties was ſufficient to take the note as to both, out of the ſtatute. And in a ſubſequent caſe of *Jackſon* v. *Fairbarn*, 2 *Hen. Black.* 340, where there was a promiſſory note by two, and one of them had become bankrupt, and the holder of the note had received a dividend on it within ſix years, it was adjudged that this ſhould prevent the other maker of the note from availing himſelf of the ſtatute of limitations. That what was the caſe where the demand aroſe under an expreſs contract, as in the caſe of notes, equally applied to the implied contract, where the money was paid on account of two.

Lord

Lord KENYON ſaid, he had ſome doubts about the point, and would reſerve the caſe.

If a Defendant, upon whom a demand is made, ſays, that he is protected by the length of time the money has been due; it is an acknowledgement of the debt, and ſhall charge him.

The Plaintiff's counſel then ſaid, they had other evidence of an acknowledgment by the Defendant *Bradſhaw* himſelf; and called up a witneſs, who was clerk to the attorney for the Plaintiff. He proved, that on the Defendant's (*Bradſhaw*) being arreſted, in a converſation with him on the ſubject of the arreſt, *Bradſhaw* ſaid, that the Plaintiff had paid money for him twelve or thirteen years ago, but that he had ſince become a bankrupt, by which he was diſcharged, as well as by law, from the length of time ſince the debt had accrued.

Gibbs contended, that this evidence was not ſufficient to charge the Defendant; that it was againſt the ſenſe and ſpirit of the ſtatute that it ſhould be ſo: that the plea of the ſtatute of limitations itſelf, admitted the exiſtence of the debt, but claimed a diſcharge by reaſon of the ſtatute; and that it would be depriving the party of the protection of the ſtatute, if the claim of that protection ſhould be conſtrued into an admiſſion of the debt, and be ſufficient to charge him.

Lord KENYON, ſaid, he was not now to put a conſtruction on the ſtatute of limitations for the firſt time. It had been decided that any acknowledgement of the debt was ſufficient to take the caſe out of the ſtatute; and he was bound to hold it ſo.

The Plaintiff had a verdict.

Erſkine, *Garrow*, and *Marryat* for the Plaintiff.

Gibbs, *Percival*, and *Beauclerk* for the Defendant.

SITTINGS

SITTINGS AFTER TERM AT GUILDHALL.

June 6th.

DENNIS *v.* MORRICE.

Nothing shall dispense with the want of notice, to the drawer of the non-payment of a bill of exchange, but the circumstance of there being no effects of the drawer in the drawee's hands; it is inadmissible evidence that the drawer was not damnified from the want of notice.

THIS was an action of assumpsit, to recover the amount of a bill of exchange drawn by the Defendant *Morrice*, on *Siardet* and Co. in favour of *Barbier Bobbier* and Co. and indorsed to the Plaintiff.

The Defendant was a foreigner: he had no notice of the non-payment by the acceptors; but being asked to pay the bill, he said, "I am not acquainted with your laws; if I am bound to pay it, I will."

Gibbs, for the Plaintiff. The money was in the hands of *Siardet* and Co. at the time of the demand made on the Defendant; the Plaintiff might have had it from them at any time. The principle upon which notice has been held to be necessary to be given to the drawer, is, that he may receive a prejudice from the want of notice, as he might take his effects out of the hands of the drawee; if therefore I can shew that no prejudice whatever arose to the drawer from the want of notice, that shall dispense with the necessity of it. If the Plaintiff is not allowed to go into this kind of evidence, the drawer must hold the money received from the payee, as the consideration of the bill, without the possibility of its ever being recovered.

Lord

Lord KENYON. I cannot hold the law to be ſo. The only caſe in which notice is diſpenſed with, is where there are no effects of the drawer in the drawee's hands. This would be extending the rule ſtill further than ever has been done, and opening new ſources of litigation, in inveſtigating, whether in fact the drawer did receive a prejudice from the want of notice, or not.

The evidence was therefore rejected, and the Plaintiff was nonſuited.

Gibbs and *Eaſt* for the Plaintiff.

Law and *Adam* for the Defendant.

COLE, Executor of COLE, *v.* SAXBY.

ASSUMPSIT for money paid by the teſtator to Defendant's uſe, with the uſual money-counts.

Pleas,—1ſt, Non-aſſumpſit; 2d, Infancy; 3d, The ſtatute of limitations; *viz.* That the Defendant did not undertake or promiſe within ſix years before the commencement of *this* action.

Iſſue was joined on the firſt plea: to the ſecond, there was a replication that the Defendant had made a new promiſe after his coming of full age: and to the third, the Plaintiff replied, That the teſtator, in his life-time, ſued out a writ for the ſame cauſe of action, and ſoon after died: and that the Plaintiff, as his executor, within a reaſonable time after his death, ſued out the writ upon which the preſent action was founded; and that though the Defendant

If the Plaintiff to a plea of infancy, replies a new promiſe after full age, and the evidence is of a promiſe to pay "when the party is able," the Plaintiff muſt prove that the Defendant was of ability; but it is ſufficient to give evidence of ability, from oſtenſible circumſtances and appearance in the world.

Defendant did not promiſe within ſix years before the commencement of this ſuit, yet that he did promiſe within ſix years before the commencement of the teſtator's action.

Rejoinder—That the teſtator's writ was not ſued out as it purported (that is, on the laſt day of Trinity Term laſt paſt) but on the 12th day of *October*; and that the Defendant did not undertake or promiſe within ſix years before the 12th of *October*.

Surrejoinder—That the Defendant did undertake within ſix years before the 12th of *October*.

Upon which iſſue was joined.

The Defendant *Saxby* and the teſtator, had been joined in a bond for ſecuring an annuity to one *Duckett*.

Under this bond the teſtator had paid the whole amount; and the preſent action was brought to recover the moiety of the money ſo paid.

To prove the Replication to the ſecond plea, that the Defendant had promiſed to pay after attaining full age, the Plaintiff called a witneſs, who ſtated that he had called on the Defendant, reſpecting the money paid by the Plaintiff's teſtator, on account of the bond. In the courſe of converſation, that the Defendant ſaid, he had had very heavy loſſes in trade; but that he would pay his part when he was able.

Lord KENYON. This is not an abſolute promiſe to pay; it is, "when he is able." I remember a caſe before Lord MANSFIELD, in Staffordſhire, in which he was of opinion, that it was incumbent on the Plaintiff to ſhew that the Defendant

was

was of ability to pay at the time of the action brought.

The Plaintiff's counſel then called a witneſs to prove to that effect. The Defendant's counſel croſs-examined him as to his particular knowledge of the Defendant's circumſtances; whether he knew the ſtate of his debts, or how he was circumſtanced.

Where the whole of a bond has been paid by one obligor, and he brings aſſumpſit againſt his co-obliger for contribution, query, Is non-aſſumpſit, infra, for arrears, a good plea? or is not there the ſame limitation to ſuch a demand as to the bond itſelf?

Lord KENYON ſaid, it was not neceſſary to enquire further than his oſtenſible appearance and his circumſtances, as they were open to the obſervation of the world; that if appearances were that he was of ſufficient ſubſtance and ability, he ſhould hold it ſufficient to ſatisfy the promiſe.

The Plaintiff did give ſuch evidence, and ſatisfied his Lordſhip, who held it to be ſufficient.

Lord KENYON then addreſſing himſelf to the Defendant's counſel, ſaid, that the pleadings had gone to a conſiderable length, and as the Plaintiff had made out ſuch a caſe as entitled him to recover, it might be unneceſſary to obſerve on it; but that he had conſiderable doubts whether the ſtatute of limitations attached on the caſe. The demand aroſe under a deed; and there had been a caſe in which a very conſiderable law-authority had been of opinion, that ſuch a debt was entitled to the ſame limitation as the deed itſelf.

The Plaintiff had a verdict.

Gibbs

Gibbs and *Cowley* for the Plaintiff.
Erſkine and *Madocks* for the Defendant.

Vide *Beſford* v. *Saunders*, 2 Hen. Black. 116. *Cowell* v. *Edwards*, Boſ. and Pull. 268.

But where an action is brought for *Tort* againſt two Defendants, and the whole of the damages are levied againſt one; it was decided in this caſe, that the party who had ſo paid the whole of the damages, could not call on the other Defendant in an action for money paid to his uſe. The caſes of contribution are confined to joint demands ariſing on contracts. *Merryweather* v. *Nixon*, 8 Term Rep. 186.

CASES

ARGUED AND RULED

AT NISI PRIUS,

EASTER TERM, 30 GEO. III.

IN THE COMMON PLEAS,
FIRST SITTING IN TERM.

MALE *v.* ROBERTS.

May 15th.

ASSUMPSIT for money paid, laid out, and expended, to the uſe of the Defendant; money lent and advanced, with the other common money-counts.

When the cauſe of action accrued in Scotland, and infancy pleaded, the Defendant muſt ſhew that infancy is a legal defence to the demand, by proving the law of that country in that reſpect.

Plea of the general iſſue.

The caſe, as opened by the Plaintiff's counſel, was, that the Plaintiff and the Defendant were performers at the *Royal Circus*. While the company were performing at *Edinburgh*, in *Scotland*, the Defendant had become indebted to one *Cockburn*, for liquors of different ſorts, with which *Cockburn* had furniſhed him; not having diſcharged the debt, and it being ſuſpected that the Defendant was about to leave *Scotland*, *Cockburn* arreſted him, by what is there termed a Writ of *Fugé*: the object of which is to prevent the debtor from abſconding.

The

The Defendant being then unable to pay the money, the Plaintiff paid it for him; and he was liberated. The preſent action was brought to recover the money ſo paid, as money paid to his uſe.

The defence relied upon was, that the Defendant was an infant when the money was ſo advanced.

Lord ELDON. It appears from the evidence in this cauſe, that the cauſe of action aroſe in *Scotland*; the contract muſt be therefore governed by the laws of that country where the contract ariſes. Would infancy be a good defence by the law of *Scotland*, had the action been commenced there?

Beſt, Serjeant, for the Defendant, contended, that the contract was to be governed by the laws of *England*; in which caſe the Plaintiff could recover for neceſſaries only. That at all events it ſhould not be preſumed that the laws were different; and as it appeared that the debt did not accrue for neceſſaries, the Plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

Lord ELDON. What the law of *Scotland* is with reſpect to the right of recovering againſt an infant for neceſſaries, I cannot ſay; but if the law of *Scotland* is, that ſuch a contract as the preſent could not be enforced againſt an infant, that ſhould have been given in evidence; and I hold myſelf not warranted in ſaying that ſuch a contract is void by the law of *Scotland*, becauſe it is void by the law of *England*. The law of the country where the contract aroſe, muſt govern the contract; and what that law is, ſhould be given in evidence to me as

a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence.

The Plaintiff failed in proving his case, and was nonsuited.

Cockell, Serjt. and ——— for the Plaintiff.

Best, Serjeant, for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER, IN THE COMMON PLEAS.

LEIGH *v.* WEBB. *June 4th.*

THIS was an action of malicious prosecution.

The first count of the declaration stated, that the Defendant having suspected that the Plaintiff had feloniously stolen some casks, his property, had procured him to be imprisoned, under a warrant obtained under such charge, without any probable cause. There were three other counts in the declaration; in all of which it was charged, that the Defendant imposed on him the crime of felony, and caused him to be imprisoned, &c.

Plea of Not Guilty.

The Plaintiff was a publican, and dealt with the Defendant as his brewer; the casks in question had been sent into the Plaintiff's house with ale; and when they became empty, they had been sent to the

In an action for a malicious prosecution, in which the Plaintiff charges the Defendant with having imposed on him the crime of felony, by reason of which he was imprisoned, and on production of the information before the justice, there is no charge of felony, though the warrant was to arrest the Plaintiff for felony, the evidence does not support the declaration, and the Plaintiff shall be nonsuited.

houſe of a perſon of the name of *Liſter*. The Defendant having obtained a ſearch-warrant, on the ſuggeſtion of his caſks having been ſtolen, he found them in *Liſter*'s poſſeſſion, and then procured a warrant from *Bow-ſtreet*, under which he took the Plaintiff into cuſtody. He was brought before the Juſtice there, who committed him for further examination, from *Saturday* till the *Monday* following.

The Plaintiff called the clerk of the public office in *Bow-ſtreet*, who produced the information which contained the above ſtatement of facts: but the information contained no direct charge of felony in terms againſt the Plaintiff; but the warrant which the magiſtrates had iſſued, grounded on that charge, and under which the Plaintiff had been apprehended and committed for further examination, was "on ſuſpicion of having feloniouſly taken and having in his poſſeſſion caſks, the property of the Defendant."

If a party makes a complaint before a juſtice of peace, which the juſtice conceives to amount to a felony, and iſſues his warrant accordingly to arreſt the party complained againſt, and the facts do not amount to felony, no action for a malicious proſecution will lie againſt the party who made the complaint.

Lord ELDON. Upon this evidence, I am of opinion that the Plaintiff muſt be called. The Plaintiff in every count of his declaration, except the firſt, complains that the Defendant impoſed the crime of felony on him; and that count varies from the information. Does the evidence correſpond with the caſe the Plaintiff has put upon this record? There is no charge of felony contained in the information; it contains a ſtate of facts certainly not amounting to felony, but for which an action of trover could be maintained. The Defendant having loſt his property, ſtates the facts to the magiſtrate; upon

upon which he is to form his judgment. If the higheſt criminal Judge of the land was, by miſtake of judgment, to conceive that to be felony which did not amount to that offence, and to commit the party complained againſt, would that ſubject the party complaining to an action of this ſort? I am of opinion it ought not, and that the Plaintiff muſt be nonſuited.

Nonſuit.

Cockell, Serjt. *Shepherd*, Serjt. and *Barrow*, for the Plaintiff.

Bailey and *Beſt*, Serjts, for the Defendant.

ANDERSON, Adminiſtrator, *v.* MAY.

Where an attorney has regularly delivered a bill ſigned, he may give in evidence a copy of his bill as delivered, without giving the Defendant notice to produce that delivered to him.

ASSUMPSIT to recover the amount of an attorney's bill, for buſineſs done by the teſtator in his life-time.

The attorney had, ſome time previous to his death, delivered a regular bill to the Defendant: no notice had been given to produce it; but the Plaintiff proved that a bill had been ſo delivered, and offered a copy of it in evidence.

Heywood, Serjt. for the Defendant, contended, that this could not be done: that there was no more ſettled point at *Niſi Prius*, than that a copy cannot be given in evidence, unleſs there has been notice to produce the original.

It was anſwered by *Shepherd*, Serjt. for the Plaintiff, that the paper offered was not a copy of the bill delivered, but itſelf an original; both it

and that delivered to the Defendant, being tranſcripts from the attorney's books. That in the caſe of notices to quit, it was the conſtant practice to give in evidence a copy of the notice to quit, ſerved on the Defendant, without giving any notice to produce the original.

Lord ELDON ſaid, that he was of opinion the paper offered in evidence was admiſſible, though no notice had been given to produce that delivered to the Defendant, as he conſidered both as originals.

Verdict for the Plaintiff.

Shepherd, Serjeant, and *Marryatt* for the Plaintiff.

Heywood, Serjeant, for the Defendant.

Vide *Jory* v. *Orchard*, 1 Boſ. and Pull. 39.

HOLLAND *v.* HOPKINS.

If Plaintiff delivers a particular of his demand, under a Judge's order, "for goods ſold and delivered to the Defendant," he cannot go into evidence of a demand for goods of the Plaintiff ſent to him to be ſold, as agent for the Plaintiff, and for which he has received the value, and recover that value as money had and received.

THIS was an action of aſſumpſit, for goods ſold and delivered, with the common money-counts. The Defendant took out a ſummons for a particular of the Plaintiff's demand, and the following was given in:

Holland v. *Hopkins*.

"This action is brought to recover *l.*
"being ſo much money due and owing on an
"account ſettled and balanced for horſes, the
"property of the Plaintiff, ſold and delivered
"before the 11th day of *September*, 1797. *£.*

"And

" And a further ſum of *l.* for horſes " ſold and delivered by the Plaintiff and his " ſervants to the Defendant, on or about the " 11th day of *September*, 1797. *£.* "

The Defendant paid money into court, ſufficient to cover the demand on the account ſtated.

The Plaintiff gave in evidence the ſending of ſeveral horſes from the country to the Defendant's yard; where they were ſold by the Defendant, as his agent. About the 11th of *September*, 1797, they balanced their accounts, and the Defendant's was then found in arrear, in a ſum of money equal to that which the Defendant paid into court.

After the account had been ſo ſettled, on the 11th of *September*, the Plaintiff ſent other horſes to the Defendant, who ſold them as before, and received the money. This conſtituted the ſecond article in the bill of particulars, which the Plaintiff ſought to recover.

It was contended by the Defendant's counſel, that the Plaintiff could not recover on this evidence, within the particular as delivered in by him: that the demand to which the Plaintiff's evidence applied, was for money had and received, being the price of the horſes ſold by the Defendant for the Plaintiff, and the price of which he had received: whereas the particular was not for money had and received, but for goods ſold to the Defendant by the Plaintiff; whereas no ſuch tranſaction had ever taken place.

The Plaintiff's counſel contended, that the only uſe of the particular being to apprize the Defendant

of the nature of the Plaintiff's demand,—that the ſame degree of accuracy was not required in it as in pleading. That here the demand did ariſe from the ſale of horſes, and was therefore a ſufficient intimation to the Defendant for what the Plaintiff meant to go: but that, at all events, the money being paid into court generally, they would apply that money to the ſecond article of the particular, and go on the account ſtated for the balance.

Lord ELDON ſaid, he was of opinion, that under the particular, the Plaintiff could not recover: that the uſe of the particular was to apprize the Defendant for what demand the Plaintiff meant to go, that he might direct his proof accordingly, and not be taken by ſurprize at the trial; and that the Plaintiff ſhould not miſlead the Defendant, by giving in one thing as his demand, under a Judge's order, and ſtarting another at the trial. That it was evident here that the Plaintiff could only recover (after taking the money out of court) on the count for money had and received: but was the Defendant apprized of that by the particular? Certainly not. He was told, the demand was for horſes ſold and delivered by the Plaintiff and his ſervants to the Defendant, this was a demand on a ſale to the Defendant himſelf; it was a different contract, and tended to take the Defendant by ſurprize. In that point of view, he thought the Plaintiff ought not to be allowed to go into any evidence of it.

With reſpect to the Plaintiff's right to apply the money paid into court to the count for horſes ſold and delivered, and to go now for the balance of the account

account ſtated, his Lordſhip added, I think he cannot now do ſo, as he has given no evidence whatever of any horſes ſold by him to the Defendant; his evidence has only gone to the count for the account ſtated; and I ſhall therefore hold, that it is upon that count only to which the money paid into court can be applied.

The Plaintiff was therefore nonſuited.

Cockell and *Shepherd*, Serjts. and ——— for the Plaintiff.

Beſt and *Bailey*, Serjts. for the Defendant.

Vide 2 *Boſ.* and *Pull.* 243. S. C.

SITTINGS AFTER TERM AT GUILDHALL, IN THE COMMON PLEAS.

PARK *v.* MEARS.

THIS was an action of debt on bond.

Plea of *Non eſt factum.*

To prove the execution of it, the Plaintiff called the ſubſcribing witneſs, a Mr. *Hearn.*

He proved, that being in *Ireland* at the time the bond bore date, and where it appeared to be executed, he was called into the *Mayoralty-houſe*, in *Dublin.* That while he was waiting in the anti-chamber, an attorney of his acquaintance came out, with the Defendant on his arm, and aſked him to ſign thoſe papers for his friend *Mears.* The bond had

It is not neceſſary that the ſubſcribing witneſs ſhould ſee the obligor ſign and ſeal the bond; it is ſufficient if, after he has ſigned and ſealed it, the witneſs is requeſted to put his name to it, in the preſence of the obligor, and it is then ſtated that the obligor had executed it; and if he does ſo put his name to it, he is a good witneſs to prove the execution.

had in fact been executed by the Defendant *Mears*, in an adjoining room, and ſubſcribed there by another atteſting witneſs; but he was perfectly acquainted with the hand-writing of *Mears*, recognized his ſignature, and ſubſcribed his name to the bond as a witneſs in *Mears*'s preſence.

It was alſo proved, that the Defendant had, at a ſubſequent time, admitted his execution of the bond.

Bailey, Serjt. for the Defendant, contended, that this was inſufficient evidence to prove the iſſue, that it was the Defendant's deed. He contended, that in all caſes of bonds, the ſubſcribing witneſs muſt neceſſarily be called, to prove the actual execution of the bond by the obligor; that in this caſe the witneſs had not ſeen the obligor do any act of execution; that if it was executed in the adjoining room, and there ſubſcribed by the other witneſs, the execution was complete, and *Hearn*, the witneſs, putting his name to it afterwards, could not make him a ſubſcribing witneſs. That as to the ſubſequent acknowledgment of the obligor, that was not ſufficient evidence upon this iſſue; and had ſo been decided.

Vaughan, Serjt. contended, that the whole was one tranſaction, which took place at the time of the execution of the deed. That it was not neceſſary for the ſubſcribing witneſs to ſee the obligor actually ſign and ſeal the deed at the time; that an acknowledgment at the time when the deed was executed, and the witneſs called upon to ſign his name, was ſufficient; and had ſo been held.

Lord

Lord ELDON ſaid, he had doubts whether it was admiſſible and ſufficient evidence of the execution of the deed; but that, at all events, he thought it ſufficient evidence to go to the jury when coupled with the Defendant's admiſſion.

The jury found for the Plaintiff.

Vaughan, Serjeant, and *Park* for the Plaintiff.

Bailey, Serjeant, for the Defendant.

In the next Term, *Bailey*, Serjt. moved for a rule *Niſi* to enter a nonſuit; but the court held the evidence of the execution ſufficient, conſidering the whole as one tranſaction. Bof. and Pull. 217.

Ley v. *Ballard*, et alt. Sittings after Hilary Term, 30 *Geo.* III. at *Guildhall*.

Debt on bond. One Defendant let judgment go by default; *Ballard*, the other Defendant, pleaded *Non eſt factum*.

There were two witneſſes to the bond.

They were called; but neither of them ſaw it executed by the Defendant *Ballard*.

The Defendant's counſel contended, that they were entitled to nonſuit the Plaintiff, as there was no proof of the execution by the ſubſcribing witneſſes.

Per Lord KENYON. The ſubſcribing witneſs to a bond muſt be called to prove it; if they diſavow having ſeen it executed, other perſons who ſaw it executed, or can prove the party's hand-writing, may be called. So if the ſubſcribing witneſſes prove contrary to what their atteſtation purport, namely, that the party did not execute it, it is open to the party to eſtabliſh the inſtrument by other evidence. This was done in the caſe of *Jolliffe*'s will.

In the principal caſe, the Plaintiff proved the hand-writing of *Ballard*; and that he had been heard to ſay, that he had done ſo, and was afraid he would be obliged to pay it.

Lord KENYON held this to be ſufficient; and the Plaintiff had a verdict.

Vide

Vide *Abbott* v. *Plumb.* *Doug.* 216.

Laing v. *Raine.* 2 *Bof.* and *Pull.* 85.

Grellier v. *Neale*, *Peake* N. P. Caſ. 146. To proye a partnerſhip-deed, the Plaintiff's counſel called the ſubſcribing witneſs; ſhe ſaid, She did not ſee the deed executed, but that *Neale*, the Defendant, brought it to her, and deſired her to put her name to it as a ſubſcribing witneſs; which ſhe did. This was held to be ſufficient evidence of the execution by *Neale*.

1 *Eſpin.* N. P. Caſes, *Powell* v. *Blackett*, 97.

SEDLEY *v.* ARBOUIN, Executor of WEST, deceaſed.

Where a perſon is ſent over from Ireland, under a warrant from the Secretary of State for Ireland, charged with any offence, and is committed to priſon until he can be brought before a Judge, and the warrant is left with the gaoler, it is ſuch a commitment and warrant as the priſoner is entitled to a copy under the Habeas Corpus, after it has been demanded.

THIS was an action of debt, brought againſt the Defendant, as the executor of *Henry Weſt* deceaſed, to recover the amount of two penalties under the *Habeas Corpus* act.

Weſt the deceaſed, in his life-time, had been the keeper of the *Poultry Compter*.

By the *Habeas Corpus* act, 31 *Car.* II. ch. 2. ſect. 2, it is enacted, "That if any officer, gaoler, &c. ſhall not within ſix hours after demand, deliver a true copy of the commitment of any priſoner in his cuſtody, he ſhall forfeit for the firſt offence 100*l.*, and for the ſecond offence 200*l.*, and be made incapable of holding his office."[a]

Under this clauſe of the ſtatute the preſent action was brought; the Plaintiff, by his declaration, complained, that being in the cuſtody of *Henry Weſt*, then keeper of the *Poultry Compter*, he had demanded a copy of the commitment or warrant under

which he was held in cuſtody; which the ſaid *Henry Weſt* had neglected and omitted to give, purſuant to the ſtatute; and the offences were laid diſtinctly in the different counts of the declaration, as committed on two different days.

The circumſtances of the caſe were theſe:—A trader, of the name of *Nowlan*, having become bankrupt, and being ſuſpected of having ſecreted property to a conſiderable amount, particularly three bank notes, to the amount of 1000 *l.* each, and he being then in cuſtody, under a committal by the Commiſſioners on his laſt examination, for not having anſwered to their ſatisfaction; his aſſignees having reaſon to believe that thoſe notes were in the poſſeſſion of the Plaintiff, *Nowlan*'s wife, and ſome other perſons who were then in the city of *Dublin*, they made an application to the Duke of *Portland*, as Secretary of State, who ſent his official letter to *Dublin*; in conſequence of which the Plaintiff and the others were arreſted, and ſent to *Newgate* there; from thence they were tranſmitted to *England*, under the following warrant from Lord *Caſtlereagh*, the Secretary of State for *Ireland*:

"*By the Right Honourable Lord* Caſtlereagh,
"*Chief Secretary to the Lord Lieutenant*
"*and General Governor of* Ireland.

"THESE are, in His Majeſty's name, to authorize and require you, to receive the bodies of *John Luther Yates*, *Davenport Sedley* (the Plaintiff) *Michael Morris*, and *Sarah Nowlan*, now priſoners in the gaol of *Dublin*, and to carry them to *London*; and

"upon

" upon your arrival there, to carry them before
" the Lord Chief Juſtice of His Majeſty's
" Court of King's Bench, of *England*, in order
" to their being tried for the offence with which
" they ſtand charged. In the due execution
" whereof, all Mayors, Sheriffs, Juſtices of
" the Peace, Conſtables, and all others His
" Majeſty's Officers, civil and military, and
" loving ſubjects whom it may concern, are
" to be aiding and aſſiſting to you, as there
" ſhall be occaſion.

" Given at His Majeſty's Caſtle of *Dublin*,
" this 12th day of *June*, 1799.

" *To Mr.* Wm. Shee, *and his Aſſiſtants.*"

In purſuance of this warrant, the priſoners were brought to *London*, in the cuſtody of Mr. *Wm. Shee*, to whom the warrant was directed, and arrived there on the 21ſt of *June*, 1799.

On their arrival in *London*, they were brought to the *Poultry Compter*. The keeper refuſed to receive them at firſt; but afterwards, a city conſtable being procured by *Shee*, the priſoners were then received by *Weſt*, the keeper, and with them was left the warrant, above-ſtated, of Lord *Caſtlereagh*.

On the evening of that day (the 21ſt) *Davenport Sedley*, the Plaintiff, demanded a copy of the warrant of committal. He was put off till the next morning: the next morning he again demanded it; and it was not delivered till the day following (the 23d); on which day a copy was delivered by *Weſt*, the keeper.

The

The Plaintiff's cauſe of action was grounded on theſe two refuſals of the copy of the warrant, as entitling him to the ſeveral penalties of 100*l.* and 200*l.* for the firſt and ſecond offence.

Upon this evidence, the counſel for the Defendant contended, that the action could not be maintained: That this was not ſuch a committal as required a copy of the warrant, being merely for ſafe cuſtody until the Plaintiff could be brought before the Chief Juſtice of *England*, purſuant to the warrant: That it could not be deemed a committal under the warrant, as Lord *Caſtlereagh*, the Secretary of State for *Ireland*, could have no power or authority to commit to an *Engliſh* gaol: That if he was to be deemed to be therefore in cuſtody under this warrant, it was illegal, and the grievance ſhould have been the object of an action for falſe impriſonment, and was not ſufficient to ſuſtain an action for a breach of the *Habeas Corpus* act: but that if it was to be conſidered as a warrant to which the Plaintiff was entitled to a copy, that it being delivered to him on the 23d, and his having received it, was a waiver of the offence.

Lord ELDON. This is an action of debt on the *Habeas Corpus* act; an act made for the protection of the liberty of the ſubject,—a protection which it affords beyond any other act in the ſtatute-book; it therefore calls for the greateſt attention from the Judge and from the Jury who try the cauſe; and ſo ſcrupulouſly has this ſtatute been obſerved, that this is the firſt action on the act which has been tried within my time, or within my memory.

The

The firſt proviſion of the act is, that gaolers ſhall make ſpeedy returns to writs of *Habeas Corpus*. The clauſe of the ſtatute in queſtion, commands him within ſix hours after demand, to give to the priſoner a copy of the warrant of his commitment and detainer. It is in order that he may be adviſed, Whether the offence for which he ſtands committed, entitles him to be bailed by the laws of the land?

The law, therefore, on this ſubject is this:—Was the Plaintiff in cuſtody under a warrant of commitment and detainer, or not? If he was not,—if there was no warrant; I am of opinion the action ſhould be falſe impriſonment againſt the gaoler: but if he was in cuſtody under any ſuch warrant of commitment or detainer, the gaoler is liable in this action.

With reſpect to offences committed here and in *Ireland*, the law is the ſame; the charge is made and the offence tried in the county where the offence is committed; and the magiſtrates act within their own juriſdiction. The King is the great Magiſtrate of both countries; his power is executed by his Secretary of State; he puts it in force by ſending over the party arreſted, by his warrant to the magiſtrate of that county where the offence has been committed. Under this power, Lord *Caſtlereagh* iſſued the warrant in queſtion: it was a proper, wiſe, and legal exerciſe of that power which he enjoyed as Secretary of State; the offence was committed in *England*; it muſt be tried in *England*; and the offenders muſt be tranſmitted here for the purpoſe

of

of trial; and the warrant was the authority under which he was brought, and under which he was detained in cuſtody.

How then are the facts? *Shee* arrives in *London* on the 21ſt of *June*; he applies to the *Poultry Compter* to lodge his priſoners there; the turnkey refuſes to receive them, without other authority; a city-conſtable is called, and the Plaintiff is then received into the cuſtody of *Weſt*, the keeper, with no other charge than what appears from Lord *Caſtlereagh*'s warrant; which warrant is left with the gaoler, and which he receives. Is it to be ſaid, This was not a warrant of commitment and detainer? Is the gaoler, after ſo receiving it, to queſtion its legality, as a defence to a breach of the *Habeas Corpus* act? I am of opinion it was a warrant of commitment and detainer; that the priſoner was entitled to a copy of it; and that the offence is complete.

It has been ſaid, that the offence has been waived by the ſubſequent delivery and acceptance of a copy on the 23d. I am of a different opinion. If the copy is refuſed at one time, the delivery at another will not ſatisfy the ſtatute.

The jury found a verdict for the 100*l.* penalty.

Cockell, Serjt. and ——— for the Plaintiff.

Shepherd and *Beſt*, Serjts. for the Defendant.

Vide Lord *Campden*'s argument in the caſe of *Entick* v. *Carrington*, 11 State Trials, 316.

Rex v. *Kendall* and *Roe*, 1 *Salk.* 347. 1 Lord *Raymond*, 65.

Sir

Sir *Wm. Wyndham*'s caſe, 1 *Stra.* 2.
Rex v. *Florence Henneſſey*, 1 *Burr.* 642.
Sayre v. Lord *Rochford*, 2 *Black.* Rep. 1165.
Rex v. *Wilkes*, 2 *Wills*, 150.

SAUNDERSON *v.* JACKSON and HANKIN.

A trader who is in the habit of delivering printed bills of parcels, to which his name is prefixed, delivers one containing the quantity and price of the article, it is a good note in writing, within the ſtatute of frauds, particularly if it is referred to by a ſubſequent letter.

THIS was an action on the caſe, for not delivering to the Plaintiff a quantity of gin.

The Defendants were diſtillers, and the Plaintiff a dealer in ſpirits.

The Plaintiff proved,—That being in want of gin, he applied to the Defendants, to purchaſe ſome. That the Defendants agreed to ſell him 1000 gallons at 7*s. per* gallon: that he then gave an order to that amount, and a bill of parcels was given to him in the following words:—

"*London, Dec.* 1799.

"Bought of *Jackſon* and *Hankin*, Diſtillers,

"No. 8, *Oxford-ſtreet*,

"1000 gallons of gin, 1 in 5, at 7*s.* £. 350

Part of the bill was printed; but the words "1000 "gallons of gin, 1 in 5, at 7*s.* £. 350," was in writing.

The Plaintiff did not immediately call for the gin; and in about a month, the Plaintiff received the following letter from the Defendants:—

Mr.

" Mr. *Saunderſon*,

" Sir,

" We wiſh to know at what time we ſhall " ſend you part of your order: we ſhall be " obliged for a little time for delivery of the " remainder. Muſt requeſt you to return our " pipes. " Your humble ſervants,

" *Jackſon* and *Hankin*."

This was the evidence of the purchaſe of the gin by the Plaintiff. There had been a conſiderable riſe in the article, and the Defendants refuſed to deliver it; and now ſet up as a defence, that this being a contract for the ſale of goods to be delivered in future, was void for want of a note in writing, under the ſtatute of frauds.

It was contended by the Defendants counſel, that the ſtatute required ſome note or memorandum in writing of the bargain, to be made and ſigned by the parties or their agents: that here the bill of parcels was not itſelf the contract; it was not ſigned by the Defendants; and was only evidence of a prior contract not reduced into writing.

Shepherd, Serjt. for the Plaintiff contended, that there was a ſufficient memorandum within the ſtatute of frauds: that the printed name in the bill delivered by the party himſelf, was a ſufficient ſigning to ſatisfy the ſtatute, as the bill of parcels contained the quantity and price, which were the eſſential parts of the contract; and that it was ſo conſidered by the Defendants themſelves was obvious from the letter, wherein it was referred to as

the agreement, purſuant to which the gin was to be delivered.

Lord ELDON ſaid, he was of opinion there was a ſufficient note in writing within the ſtatute. There was no neceſſity to have the name put in any particular place: an agreement for the ſale of lands, beginning, "I *A. B.* agree," &c. was held to be ſufficient within another clauſe in the ſtatute of frauds requiring a note in writing. That in this caſe, it appeared the Defendants had their bills of parcels printed, and their names prefixed: that he thought a man who delivered his bills of parcels, with his name printed, might be ſaid to ſign by his name printed, as well as by it written; and that ſuch was ſufficiently ſigned. At all events, he ſhould direct the jury ſo to conſider it, particularly coupled with the letter, wherein the agreement was recogniſed.

Verdict for the Plaintiff.

Lens, Serjt. and *Lawes* for the Plaintiff.

Shepherd and *Beſt*, Serjts. for the Defendant.

PULTNEY, Bart. *v.* KEYMER *et alt.*

If a broker advances money, and gives his acceptances on the credit of goods lodged in his hands, the owner cannot demand them without a full indemnity, and giving his counter acceptances, or thoſe of any

THIS was an action of trover for a quantity of ſugar.

Sir *William Pultney*, the Plaintiff, was the proprietor of an eſtate in the *Weſt Indies*: he employed a houſe in *London*, of the firm of *Petrie* and *Campbell*, as his merchants or agents, to whom conſignments were made of his property from thence; and the

the ſugars in queſtion had been ſo conſigned to them.

other perſon, to the amount of thoſe given by the broker, and becoming payable at the ſame time, is not a ſufficient indemnity in law.

The Defendants were brokers, and had advanced and given their acceptances, on account of the ſugars which were depoſited in their hands, to the amount of 18000*l.*

While the ſugars were in the Defendants hands, and before they were ſold, they received a notice from the Plaintiff not to ſell them; and that he would indemnify them from any demand on account of the ſugars, or any advances they had made.

The acceptances the Defendants had given, on account of *Petrie* and *Campbell*, were not then due.

Lord ELDON aſked the Plaintiff's counſel, if they meant to contend, That where goods are lodged in the hands of a broker, by giving him notice, they could turn him into a warehouſeman?

Serjeant *Shepherd* ſaid, he meant to contend that they could prevent him from ſelling.

On receiving the notice, the Defendants ſaid, they did not know Sir *William Pultney*; that they had received the bills of lading indorſed to them by *Petrie* and *Campbell*, and had paid the duties; and that they would ſell the goods, unleſs paid their money. The witneſs anſwered, they muſt know Sir *William Pultney*, who was the proprietor of the ſugars; that he would pay them the money advanced, on an account being furniſhed; but he admitted, that he then ſaid nothing about the ſums for which the Defendants were under acceptances.

Lord ELDON. This is the caſe of a conſignment of *Weſt India* property. *Petrie* and *Campbell*, the agents of the Plaintiff, are the conſignees; they employ the Defendants as their brokers. It is neceſſary to advance conſiderable ſums for payment of the duties, and other expences; theſe ſums are advanced by the Defendants, who alſo accept bills drawn on them by *Petrie* and *Campbell*; and *Petrie* and *Campbell* put the goods into the Defendants hands. On what ground does the Plaintiff claim to take thoſe goods out of their poſſeſſion? It muſt be, that he as owner has a right ſo to do; but I hold that he has no ſuch right, without giving a full indemnity.

What is the indemnity offered? To pay the Defendants the money actually advanced; but no offer was made to indemnify them againſt the outſtanding bills. If that offer had been made, the Defendants then would ſtand as brokers, without any advances, and could not hold the goods againſt the owner.

With reſpect to the indemnity, which the Defendants have a right to claim, it has been ſaid by the Plaintiff's counſel, that Sir *William Pultney* offered his own acceptances, which would have become due at the ſame time with the bills. That would not be ſufficient. I am of opinion, that if a man has given his acceptances on the faith of goods ſent into his hands, and they are outſtanding, he is not bound to take the promiſe or counter-acceptance of any man.

The Plaintiff was nonſuited.

Shepherd

Shepherd and *Beſt*, Serjts. and *Abbott*, for the Plaintiff.

Dallas and *Williams*, Serjt. for the Defendants.

PAGE *v.* FRY.

THIS was an action by the Plaintiff, as agent to Meſſrs. *Hyde* and *Hobbs*, merchants of *Chicheſter*, to recover the amount of a loſs on a policy of inſurance, on a cargo of barley, ſhipped on board the ſhip *Margaret*, from *Dundee* to *Chicheſter*. —Loſs by capture.

Under the averment in the declaration on a policy of inſurance, "that the party is intereſted to the whole amount of the money inſured," an intereſt in a part will entitle him to recover.

The declaration was on the policy, with the common averment; *viz.* "That certain perſons carrying on trade and commerce, under the ſtyle and firm of *Hyde* and *Hobbs*, were at the time of loading the ſaid cargo, on board the ſaid ſhip, and at the time of ſubſcribing the ſaid policy of inſurance, and from thenceforth and until the time of the loſs, *intereſted in the ſaid corn to a large amount*; *to wit*, *to the amount of all the money inſured thereon.*" The policy was for 400*l.*

The Plaintiff proved, that he was the general agent in *London* for *Hyde* and *Hobbs*; and, by their direction, ſent for the corn in queſtion, to his correſpondents in *Dundee*; by whom the corn was ſhipped and conſigned to *Hyde* and *Hobbs*, in whoſe name the bills of lading were made out; but it appeared, that while the corn was on its paſſage, *Hyde* and *Hobbs*, thinking the adventure too large, had

let a perſon of the name of *Hack* into a ſhare of the cargo, who thereby became jointly intereſted with themſelves.

Upon this coming out in evidence, the Defendant's counſel, contended, that the Plaintiff ought to be nonſuited. That the intereſt of the Plaintiff was a material averment in the declaration, and ought to be proved as laid, or it was a variance. That proof of intereſt in a part, could never ſupport an averment that the party was intereſted to the whole amount of the ſum inſured, which was the caſe here.

The Plaintiff's counſel replied, that it was ſufficient for the Plaintiff to ſhew an intereſt in the property inſured, to entitle him to recover: That here the averment was, that he was intereſted to a large amount; *to wit*, "to the amount of all the money inſured," under a *viz.*: That in actions upon bills or notes, the declaration was for the whole money mentioned in the body of the bill or note, and yet it was every day's practice for the party to recover but a part of it: That here the barley was ordered by *Hyde* and *Hobbs*, and paid for by them, and the ſale took place to *Hack* while the corn was on its way; ſo that *Hyde* and *Hobbs* might be deemed as entitled to the whole cargo, ſubject to the claim of *Hack*, for his ſhare: That in the caſe of *Page* v. *Rogers*, *Park*'s Inſ. 402, where in an action on a policy of inſurance on a ſhip, the averment was, that the Plaintiff was entitled in intereſt to one-third of the ſhip inſured; and it having come out in evidence that the Plaintiff

was

was once ſole owner; and he not having proved his having parted with his intereſt in the other two-thirds,—it was objected, that the evidence did not correſpond with this averment of intereſt in the declaration. Lord MANSFIELD over-ruled the objection.

Lord ELDON ſaid, that he had conſiderable doubts on the ſubject; but he was of opinion, that the evidence entitled the Plaintiff to recover: the order was given by *Hyde* and *Hobbs*, the cargo was conveyed to them, ſo that there was a time when the whole and abſolute property was veſted in them; during that time they had let *Hack* into a participation of the adventure. This did not ſeem to diveſt that inſurable intereſt which they originally poſſeſſed.

His Lordſhip, therefore, directed the jury to find a verdict for the Plaintiff, giving the Defendant leave to move to ſet the verdict aſide, and enter a nonſuit.

In the next term this motion was made. The Lord Chief Juſtice continued of the ſame opinion, and the reſt of the court concurred with him. Mr. Juſtice CHAMBRE, in his opinion held, that the Plaintiff was not bound, by the terms of the averment, to ſhew any thing more than that he had an intereſt in the ſubject inſured; and that if he ſhewed an intereſt to the extent of a one-hundredth part of the cargo, that it would be ſufficient. 2 Bof. and Pull. 249.

The rule was therefore diſcharged.

Lens, Serjt. and *'Eſpinaſſe* for the Plaintiff.

Shepherd and *Beſt*, Serjts. for the Defendant.

END OF EASTER TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

TRINITY TERM, 40 GEO. III.

SECOND SITTINGS IN TERM.

24th June, 1800.

ALDRIDGE, Pauper, *v.* EWEN.

In assumpsit for necessaries furnished to the Defendant's apprentice, the Plaintiff must prove him to be legally an apprentice; and if the indenture of apprenticeship has not been legally stamped, the Plaintiff cannot recover on those counts so laid.

ASSUMPSIT for meat, drink, &c. furnished to the Defendant's apprentice.

The action was brought to recover a sum of money for the board and lodging of a son of the Plaintiff, whom he alleged he had bound apprentice to the Defendant.

The Plaintiff had notice to produce the indenture of apprenticeship. A witness proved, that he had been employed to prepare it, and that it was suggested, it would save expences to have it executed at *Perth*, in *Scotland*: that it was prepared and brought from *Perth*, and was, in fact, executed at *Wapping* by the Plaintiff; but that there was no stamp to it.

Garrow,

Garrow, for the Defendant, objected: that the Plaintiff must be nonsuited, as he had not proved any legal apprenticeship of the person for whose board and lodging the Plaintiff sought to recover.

Erskine said, that he could prove the Defendant having taken the young man *as* an apprentice, and of his having served the Defendant in that capacity; and that that should satisfy the averment in the declaration.

Lord KENYON. The Plaintiff declares on a contract for necessaries furnished to the Defendant's apprentice; and this is so stated in the declaration. To entitle the Plaintiff to recover, therefore, it must appear that the relation of master and apprentice legally subsisted between the parties, as it is in that character only the Defendant is charged. This has not been made out by the Plaintiff. An apprentice can only be bound by indenture; that indenture must be legally stamped. The articles of apprenticeship, in this case, appear to have been prepared at *Perth*, and executed at *Wapping*, and to have no legal stamp. They are therefore void; and the Plaintiff has failed in proving this necessary averment, and cannot recover.

The Plaintiff proved the payment of 16*s*. at the request of the Defendant; and had a verdict for that sum.

Erskine and *Hovill* for the Plaintiff.

Garrow for the Defendant.

Same day.

BARBER v. HOLMES.

Where Defendant relies on coverture as a defence to an action, it is not sufficient evidence that her husband was living at a particular time, to produce the muster of a ship from the Admiralty, in which a person of his name is found, without other evidence of his identity.

THIS was an action of assumpsit, for goods sold and delivered.

The defence set up was,—That the Defendant, at the time of the goods being furnished to her, was a married woman.

The fact of the Defendant's having been covert, was not denied by the Plaintiff; but that upon which he relied was, that her husband was dead when she obtained the goods. He proved the delivery of the goods in *November*, 1795; previous to which time it was given in evidence, that she had been heard to declare that her husband was dead: that she had communicated to his father and brother that he was so, and had gone into mourning for him. But it was proved, that she had represented her husband to have been an officer on board a King's ship, and that he had died in the *West Indies*.

To prove that he was living subsequent to the delivery of the goods, a witness was called, who said she had received two letters from him, dated in *July*, 1796, from *Plymouth Sound*, from on board the *Santa Margaretta* frigate. But the letters were not produced; and the witness said they were lost.

Per Lord KENYON. This is not sufficient: it is not the best evidence. If he had been in *Plymouth* so recently, some witness might be called who saw him there.

Garrow

Garrow then called a clerk from the Admiralty, who produced the muſter of the ſhip *Santa Margaretta*, in order to aſcertain the time when the Defendant's huſband was living; in which muſter was the name of *John Holmes*, as a ſerjeant of marines, on board that ſhip.

Lord KENYON expreſſed ſome doubt, whether he could admit ſuch book as legal evidence?

Garrow ſaid, it was the conſtant practice at the *Old Bailey* to admit ſuch muſter-roll as evidence, in all caſes of indictments for forgeries of ſeamens wills and powers.

Lord KENYON. It is brought as evidence of the identity of the perſon; it is not ſo *per ſe*; connected with other circumſtances, it might perhaps be ſufficient; but on the whole of the evidence offered for the Defendant, ſhe has not proved that which would be an anſwer to the Plaintiff's demand, if it were true. She has herſelf repreſented, that her huſband was dead when ſhe obtained the credit. No perſon is called who has ſeen the huſband. The letters, if produced, might have been important; but none appear. The only evidence then is, that book from the Admiralty; which proves nothing as to the fact of, Whether *John Holmes*, whoſe name is there found, was the huſband of the Defendant, or not?

Verdict for the Plaintiff.

Erſkine and *Marryatt* for the Plaintiff.

Garrow for the Defendant.

SITTINGS

SITTINGS AFTER TERM AT WESTMINSTER.

July 3d.

TUSON *v.* BATTING.

If a surgeon furnishes a bill to his patient, and he leaves a blank for his charge for attendances; if the patient pays a certain sum on that account, as the surgeon made no specific charge, he is bound by the sum so paid, and can recover no more.

ASSUMPSIT by the Plaintiff, who was a surgeon, for attending the Defendant's wife.

The matter in dispute, was the quantum of payment which was claimed by the Plaintiff. The Defendant lived out of town, and the attendances had been made there: the Plaintiff claimed, as a customary charge, one guinea *per* mile for each attendance, in addition to his fee. By this mode of calculation, the Plaintiff's demand would have amounted to 200*l.*; but he had delivered a bill, without a specific charge, leaving a blank for the sum he was to receive.

The Defendant paid 70*l.* into court: this was taken out, and the Plaintiff went for a further sum.

Several surgeons were called by the Plaintiff, who all proved, that it was customary and usual for surgeons to make the charge of one guinea *per* mile, where the attendance took place out of town.

Lord KENYON, after observing that though professional men were entitled to a fair and liberal compensation for their assistance, said, There are, however, certain claims which they affect to set up, which, if unreasonable or improper, it is the business of the jury to controul, and this appears to be one of them. It has been said, that surgeons

and

and phyſicians were on the ſame footing; if it is ſo, it is of modern introduction. Dr. *Mead* and Dr. *Conyers Middleton*, early in the century, were of a different opinion, hardly ranking ſurgeons as a liberal profeſſion; and conſidering phyſicians in a very different point of view. Surgeons bills have been the frequent ſubjects of actions. I remember an action brought by a Mr. *Sharp*, for attending a patient at *Hampſtead*. Mr. *John Hunter* was examined, and ſaid, when told the patient's complaint, "I cannot conceive why the Plaintiff went there ſo often!". So that the neceſſity of thoſe frequent attendances, may become matter of inquiry. But a phyſician can maintain no action for his fees; they are *quiddam honorarium*; for which no action is maintainable. In the preſent caſe, the Plaintiff delivered a bill, leaving a blank for his attendances. I am of opinion, that it is conſidering his demand in the light of a *quiddam honorarium*, and leaving it to the generoſity of the perſon he attends; and that perſon having paid money into court to a certain amount, it is to be taken as the ſum which he conſiders as a fair remuneration for the Plaintiff's ſervices, and which the Plaintiff had left open in his bill; and that he cannot recover any more.

Chorley and Bolcot, 4 Term Rep. 317.

It appearing however afterwards, that the Defendant had made an offer to pay at a certain rate, and thereby waived the blank bill, Lord KENYON left it to the jury to ſay, Whether the 70*l.* paid into court, was not ſufficient to ſatisfy the whole of the Plaintiff's demand?

The

The jury found for the Defendant.
Erſkine and *Wigley* for the Plaintiff.
Garrow for the Defendant.

BEAL *v.* THATCHER.

In caſe, for giving a falſe character, it is evidence againſt the Defendant, that he recommended the perſon truſted, to another perſon, who was called as a witneſs.

CASE, for giving a falſe character of one *Johnſton* as to ſolvency; by reaſon of which the Plaintiff had given him credit for goods, which had not been paid for; *Johnſton* being inſolvent, and unable to pay.

The Plaintiff's counſel called a witneſs, to prove that the Defendant had recommended *Johnſton* to *him*, and repreſented him as a man entitled to credit, and in good circumſtances: that he, in conſequence, truſted *Johnſton* with goods, and had been defrauded of them, *Johnſton* being a man of no property.

Erſkine objected to this evidence. It was *res inter alios acta*. The iſſue was not, Whether he had defrauded the witneſs,—but the Plaintiff?

Lord KENYON ſaid, it was admiſſible: that it proved a ſubſiſting fraudulent connection between the Defendant and *Johnſton*, and might therefore go to the jury.

Garrow and ——— for the Plaintiff.
Erſkine for the Defendant.

GREGORY

GREGORY *v.* MERTON.

July 9th.

THIS was an action of aſſumpſit, brought to recover the amount of the Defendant's note, dated the 6th of *November* 1796.

Where Defendant pleads bankruptcy, and the Plaintiff relies on the Defendant having been a bankrupt before, it is ſufficient proof of the firſt bankruptcy to produce the proceedings, and to ſhew that the Defendant ſubmitted to that commiſſion.

The Defendant pleaded bankruptcy.

The facts were, that the Defendant had become bankrupt prior to the notes having been given; and had obtained his certificate under that commiſſion: but ſubſequent to the note, he had again become bankrupt; under which he had alſo obtained his certificate: upon which latter certificate he meant to rely.

The counſel for the Plaintiff inſiſted, that the certificate obtained by the Defendant under the ſecond commiſſion, was no bar to the action, he not having paid 15*s.* in the pound; and cited *Philpot* v. *Corden*, 5 Term Rep. 287.

The Defendant produced the certificate under the ſecond commiſſion.

To prove the firſt bankruptcy, the Plaintiff produced the proceedings under that commiſſion, as ſufficient evidence that it had iſſued.

Gibbs, for the Defendant, contended, that as the Plaintiff was to get rid of the effect of the certificate produced, by ſhewing that the Defendant had been before a bankrupt, he ſhould do it by going through the regular ſteps in eſtabliſhing a bankruptcy, by proving the party a trader, the petitioning creditors debt, &c. &c. in the uſual way.

Lord KENYON aſked, If the Defendant had ſubmitted to the firſt commiſſion?

He

He was anſwered in the affirmative. His Lordſhip then ſaid, that this being an action againſt the party himſelf, his having ſubmitted to the firſt commiſſion was ſufficient evidence of the fact of the firſt commiſſion, without going into the evidence required by the Defendant's counſel.

The Plaintiff's counſel then produced the proceedings under the firſt commiſſion; in which was the ſurrender and laſt examination of the bankrupt (the Defendant) making part of theſe proceedings before the commiſſioners.

Lord KENYON held, that that was ſufficient evidence of the former commiſſion; and that the certificate under the ſecond commiſſion was no anſwer to the preſent action, unleſs the Defendant could ſhew that, under it, he had paid 15*s.* in the pound.

Verdict for the Plaintiff.

Erſkine and *Marryatt* for the Plaintiff.

Gibbs for the Defendant.

EGG *v.* BARNETT, Gent.

Same day.

To prove payment of a debt due by the Defendant to the Plaintiff, a banker's check, drawn by the Defendant on his bankers, and which appeared to have been received by the Plaintiff, is evidence to go to the jury of the payment.

ASSUMPSIT for work and labour, and goods ſold and delivered.

Plea of *Non-aſſumpſit*.

The Plaintiff was a gunſmith; and proved the work done, and goods delivered, to the amount of his bill.

The

The Defendant's case was, That the debt had been paid.

To prove this, the Defendant produced two drafts, drawn by him on his bankers, in favour of the Plaintiff, and which had been paid: on one of them the name of *Egg* (the Plaintiff) was indorsed; and on the other, the name of *Wilks*, whom the Defendant proved to be a person employed by the Plaintiff to receive money for him.

Erskine, for the Plaintiff, objected to this evidence, as inconclusive; inasmuch as any person's name might be used in a cheque on a banker; and that if it had been given as payment, the fact of the so giving it ought to be proved.

Lord KENYON. Bills of exchange are made payment by the statute. This is not merely using the name in the body of the draft, which is arbitrary, and would of itself be certainly no evidence; but here the money has been actually received by *Egg* (the Plaintiff) and his servant, for their names are put on the back of the cheques, as receiving the money. This is evidence to go to the jury. If there were any other transactions between the Plaintiff and the Defendant to which the drafts could be applied, it would be open for the Plaintiff to shew it. I think it evidence of payment, as the giving of the draft may be coupled with the transaction of there being dealings between the parties, though it would not of itself be evidence of a debt.

The cauſe was afterwards referred to arbitration.
Erſkine and *Marryatt* for the Plaintiff.
Garrow and *Burrough* for the Defendant.

July 10. GOSS *v.* JACKSON, Eſq. and BUSHELL.

Where an act of parliament gives the form of conviction for any offence prohibited by the act, that form muſt be followed; and a warrant granted on a conviction drawn up in any other form is illegal, and the juſtice and thoſe acting under it are treſpaſſers.

THIS was an action of treſpaſs for taking the Plaintiff's goods, brought againſt the Defendant *Jackſon*, who was a juſtice of peace, and *Buſhell*, the conſtable. The goods had been taken under a warrant iſſued by *Jackſon*, directed to the conſtable, to levy the penalty on a conviction made by him againſt the Plaintiff, under the ſtat. 33 *Geo.* III. ch. 84, for not having his name painted on his cart.

The Plaintiff's counſel ſtated, that the conviction had been made without any ſummons having been iſſued.

Lord KENYON interrupted him, and ſaid, that as a conviction had in fact taken place, he could not in this action enquire into the regularity or irregularity of it; it was ſufficient that there was a conviction.

Erſkine, for the Plaintiff, then ſtated, that the warrant and conviction were both defective in form, and contrary to law. That the ſtatute had ſpecifically pointed out the form, as well as mode of proceeding in both; and in neither had the form been attended to. That the ſtatute required the warrant

of

of diſtreſs to ſet out the name of the witneſs, the informer, and the diſtribution of the penalty: this had not been done. It alſo required that the order ſhould be ſerved on the party convicted, and demand be made of the penalty before any diſtreſs could be made; which in this caſe had not been done, the order having been ſerved on the Plaintiff's ſon, by miſtake.

With reſpect to the conviction itſelf, the form was given at the end of the act of parliament; which, he contended, was the only legal form of conviction which could take place, and which Mr. *Jackſon*, the Defendant, had not thought fit to follow.

Garrow, for the Defendant, contended, that it was optional in the juſtice, in drawing up the conviction, to follow the preſcribed form or not, as given in the act of parliament. That it was ſufficient to make ſuch a conviction, to which no legal objection could be made,—the ſtatute being merely directory.

Lord KENYON ſaid, he was of opinion that the ſtatute was imperative, and that the form of the conviction there given, was not to be departed from. That a queſtion, ſomewhat ſimilar to the preſent, had been argued before the court of King's Bench, reſpecting a juſtice's order for turning an old foot-path, purſuant to the powers given by the highway act; and the opinion of the court was, that the juſtices in their order for turning the way, muſt follow the form preſcribed by the ſtatute (13 *Geo.* III. ch. 78): as the Defendant had not therefore in this

case drawn up the conviction in the legal form, the Plaintiff was entitled to recover *.

Verdict for the Plaintiff for the amount of the goods.

Erskine and *Marryatt* for the Plaintiff.

Garrow for the Defendants.

* The case alluded to by the Lord Chief Justice was, *Davison* v. *Gill*, which was argued in Trinity Term, but stood over till Michaelmas Term for a compromise; now reported in Michaelmas Term, 40 *Geo.* III. *East* Rep. 64.

The *King* v. *Mitton*. Trinity Term, 25 *Geo.* III.

This was a motion in arrest of judgment, on an indictment against the Defendant, for not obeying an order of sessions.

The Defendant had been convicted at the sessions, for not entering a servant, and had been fined: for not paying the fine, he was indicted and convicted; and the present motion was to arrest the judgment on that indictment.

Several objections were made: 1st, That the indictment was by way of recital only, and without any fact being averred: 2dly, That there was nothing in the dates or times, to shew that the offence was committed within the time necessary to constitute one: 3dly, That it did not appear that *Anthony Prior*, the servant, was a person within the meaning of the statute, liable to the duty on servants.

Cowper, for the prosecution, contended, that there being in this case a conviction, by justices having competent jurisdiction, that the conviction only was necessary to be proved, as it stood then in full force and effect.

Caldecott and *Bower*, for the Defendant, insisted on the several objections. As to the 1st, That it was a clear principle of law, that nothing was to be intended in a criminal prosecution; and that, therefore, nothing defectively set out could be supplied, as could be done in a civil action; but that in this case there was no positive charge, nor a distinct averment of the

sentence

ſentence of the juſtices: 2dly, That in every indictment the exact time of committing the offence ought to appear; but here it did not appear that the ſeſſions had any authority, becauſe the thing charged does not purport to be an offence: 3dly, That for want of ſtating the ſervant to be liable to the duty impoſed by the act, there would be ſufficient ground for arreſting the judgment, even in a civil caſe. *Com.* 576. 2 *Sho.* 1126.

Lord MANSFIELD. The foundation of the indictment is the order of ſeſſions. Nothing appears to ſhew that they had no juriſdiction; and till the order is reverſed, it ought to be obeyed. We cannot hear objections to the conviction which do not appear on the face of it, in a motion of arreſt of judgment, for diſobeying the order made on it.

BULLER, Juſtice. The order of ſeſſions is ſtated without any recital at all. Where a court, having competent juriſdiction, have pronounced an order, as long as it remains in force, it ought to be obeyed.

Rule for arreſting the judgment diſcharged.

CARROL *v.* BIRD.

July 11.

THIS was an action on the caſe.

The declaration ſtated,—That the Plaintiff's wife having been retained by the Defendant as a ſervant, was diſmiſſed from the ſaid ſervice: That after ſhe was ſo diſmiſſed, ſhe had applied to a perſon of the name of *Stewart*, for the purpoſe of being retained and hired as a ſervant: That Mrs. *Stewart* was ready and willing to have hired and taken her into her ſervice, if the Defendant would have given her a character, and ſuch character was

An action will not lie at the ſuit of the ſervant againſt his maſter for not giving him a character.

ſatisfactory: That it was the duty of the Defendant, by law, to have given her ſuch character as ſhe deſerved, and then aſſigned a breach: that the Defendant, not regarding ſuch her duty, wholly refuſed to give her any character whatever; by reaſon of which the ſaid Mrs. *Stewart* refuſed to hire her into her ſaid ſervice.

Plea of Not Guilty.

Upon the pleadings being opened, Lord KENYON aſked the Plaintiff's counſel, If they had any precedent for this action, or had ever known of ſuch an action being maintained?

Gibbs ſaid, he had no caſe.

Upon which his Lordſhip added,—There was no caſe; nor could the action be ſupported by law. By ſome old ſtatutes, regulations were eſtabliſhed reſpecting the characters of labourers; but that in the caſe of domeſtic and menial ſervants, there was no law to compel the maſter to give the ſervant a character; it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it.

Gibbs and *Woodfal* for the Plaintiff.

Garrow for the Defendant.

SEDLEY *v.* SUTHERLAND and others.

In a joint action of treſpaſs, the Plaintiff ſhould go for one treſpaſs done at the ſame time, in which all were implicated; and if he goes for a

THIS was an action of aſſault and falſe impriſonment.

The action was brought by the Plaintiff to recover damages againſt the ſeveral Defendants following;

lowing;—namely, The aſſignees of the eſtate of *Nowlan*, a bankrupt; Meſſrs. *Crowder* and *Lavie*, who were the ſolicitors under that commiſſion; and the magiſtrates by whom the Plaintiff was committed to priſon.

treſpaſs done at a time when all were not preſent, he ſhall not afterwards be allowed to go for a time when they were.

The ground of the preſent action was, the arreſt and detention before ſtated in the cauſe of *Sedley* v. *Arbouin*, ante page 174. The Plaintiff had been arreſted in *Dublin* the 16th of *April*, and continued in priſon until the 10th of *June* following.

Upon the caſe being opened, Lord KENYON ſaid, that he thought this action could not be maintained againſt the attornies, unleſs it could be proved that they had gone beyond the line of their duty, by which the Plaintiff had ſuffered. That it would be a caſe of infinite hardſhip, if an attorney, who was inſtructed to uſe the moſt effectual means to ſecure parties ſuſpected, ſhould be ſubject to actions of treſpaſs, in the fair diſcharge of their duty.

Law ſaid, that it had been decided, that an action of treſpaſs for falſe impriſonment was maintainable againſt an attorney and his client, in the caſe of *Barker* v. *Braham* and *Norwood*, 3 *Wils.* 368; but that here he could prove acts of the attornies, unconnected with their duty as attornies; —ſuch as a letter written to *Dublin*, ordering the arreſt.

Lord KENYON ſaid, he thought that circumſtance only, not ſufficient.

The Plaintiff then proceeded in his caſe; and after examining into the circumſtances of the arreſt, which took place in *Ireland*, and from whence the

Plaintiff was conveyed to *England*,—was then proceeding to examine into what paſſed before the magiſtrates.

Garrow, for the Defendant, objected to this evidence: that the Plaintiff having elected to proceed for a treſpaſs antecedent to any interference of the magiſtrates, he ſhould not now be at liberty to go into it.

Lord KENYON. Certainly not. Where an action is brought for a joint treſpaſs, and the Plaintiff elects to go for a treſpaſs committed at any particular time, he muſt confine himſelf to that period; and if all the Defendants were not then concerned in the treſpaſs committed at that time, the Plaintiff cannot have recourſe to a treſpaſs committed at a future time, when ſome of the Defendants were concerned, who were not implicated in the firſt tranſaction; and the reaſon is this, that ſome of the Defendants might be thereby ſubjected to damages for a treſpaſs, wherein they had no part or concern.

The Plaintiff was nonſuited.

Law, *Gibbs*, and *Hovill* for the Plaintiff.

Erſkine, *Garrow*, and *Knowlys* for the Defendants.

SITTINGS AFTER TERM AT GUILDHALL.

JONES *v.* BRINDLEY. *July* 15.

If the declaration on a ſpecial agreement ſtates as the foundation of the Plaintiff's action, that the Defendant was by his means enabled to receive a ſum of money, and the evidence is, that he was enabled to receive ſtock, it is a variance.

THIS was an action of aſſumpſit on a ſpecial agreement.

The declaration ſtated, that in conſideration that he, the Plaintiff, having it in his power to give the Defendant information, whereby one *Francis Needham* could recover a conſiderable ſum of money, to which he was entitled, and which belonged to one *Sarah Needham*, deceaſed, would give ſuch information as would enable the ſaid *Francis Needham* to receive the ſame,—the Defendant undertook and promiſed to pay him at and after the rate of ten *per cent.* for all the monies which he ſhould be ſo enabled to receive. The declaration then averred, that he did give ſuch information, whereby the ſaid *Francis Needham* did receive 500*l.* under the will of the ſaid *Sarah Needham*; by reaſon whereof he became liable to pay him the ſum of 50*l.*, being at and after the rate of ten *per cent.*

The Plaintiff proved the agreement to pay as ſtated in the declaration. He then gave in evidence, that he had diſcovered 500*l.* ſtock, ſtanding in the name of *Sarah Needham*, to whom *Francis Needham* was reſiduary legatee, upon which no intereſt had been received for ten years; and of which

ſtock

ſtock *Francis Needham* had procured a transfer into his own name; and there cloſed his caſe.

Gibbs, for the Defendant, inſiſted that he was entitled to nonſuit the Plaintiff. That the Plaintiff had declared he had given ſuch information of a large ſum of money, which *Francis Needham* was thereby enabled to receive; whereas the evidence was not of any money, but of ſtock; the transfer of which *Francis Needham* had been enabled to receive.

For the Defendant, it was contended, that though the ſtock was diſcovered, in fact it was of the value of 500*l.* and ſo ſatisfied the averment in the declaration.

Lord KENYON, after reprobating in very pointed terms the conduct of the Plaintiff, for making uſe of that information which his ſituation might have given him, to found a demand on its communication; and though doubting whether that objection might not go to the action itſelf, ſaid, that he was of opinion, the objection of the Defendant's counſel was good in point of law; and that the evidence varied from the declaration: that ſtock was not money; and it had ſo been decided.

The Plaintiff was nonſuited.

Garrow and *Comyn* for the Plaintiff.

Gibbs and *Bevan* for the Defendant.

Vide *Nightingale* v. *Metivier*, 3 *Burr.* 2589.

BURTON

BURTON *v.* LOYD.

July 21.

In an action for giving a false character, whereby the Plaintiff has lost the value of his goods, the person recommended having become a bankrupt, a creditor of the bankrupt is a good witness to prove the Plaintiff's case.

THIS was an action on the case, to recover damages against the Defendant, for giving a false character of one *Lewis Goldsmith*, who carried on the business of a tailor and man's mercer, under the firm of *Lewis Goldsmith and Co.*

Plea of Not Guilty.

The Plaintiff called a witness, who proved, that on the 22d of *October*, 1799, one *Rhodes* came to his shop to purchase some goods for *Lewis Goldsmith* and Co. That a reference being required by the Plaintiff, to inform himself of the credit of *Lewis Goldsmith* and Co. a reference was given to the Defendant. That the witness went to the Defendant, and mentioned that they had been referred to him, and asked him if they might trust *Lewis Goldsmith* and Co. for six months? When *Loyd*, the Defendant, answered, and said, "We are in the "habit of doing business with them to a consider-"able amount, and consider them as perfectly "safe." That in consequence of such reference, the Plaintiff delivered goods to *Lewis Goldsmith*; which had not been paid for, *Goldsmith* having become a bankrupt.

Rhodes was called as a witness. He was asked on his *voir dire*, If he was not a creditor under *Goldsmith*'s commission?

He answered in the affirmative.

Garrow then objected to his competency. He stated his objection to be, that the Plaintiff, not having

having been paid for his goods by *Goldſmith*, ſought to recover the value of them by this action; that if he ſucceeded, and did recover the value of them by this verdict, it would diſcharge the demand, and of courſe all claim againſt *Goldſmith*'s eſtate; by which means the witneſs's dividend would be increaſed.

Lord KENYON, How would the debt be diſcharged as againſt *Goldſmith*? It would not be ſo. This action is founded *in maleficio*, not on any contract: the damages to be recovered in this action are not as payment to the Plaintiff for his goods furniſhed to the inſolvent perſon, but as a puniſhment on the Defendant, for his want of good faith and integrity; and the recovery of thoſe damages would not conclude the demand for the price againſt *Goldſmith*'s eſtate, which will ſtill remain liable.

The witneſs was admitted.

Lord KENYON, in ſumming up the evidence to the jury, ſaid, that the action was founded on all the moral rules which ought to govern ſociety: that when a character was aſked of any man in trade, to whom the party enquiring was about to credit, that all the circumſtances within the perſon's knowledge ought to be ſtated, and the party left to judge for himſelf, whether he would give credit or not.

Verdict for the Plaintiff.

Erſkine, *Law*, and *Yates* for the Plaintiff.

Garrow, *Gibbs*, and *Wood* for the Defendant.

BARNETT

BARNETT *v.* STONE.

If a Defendant undertakes to pay the Plaintiff the difference between taxed coſts and coſts out of pocket, in conſideration of Plaintiff giving him time for payment of a debt recovered and the coſts, it is not uſury.

THIS was an action of aſſumpſit, brought to recover the amount of a bill of exchange, drawn in favour of the Plaintiff, by one *Thompſon*, on the Defendant, and accepted by him.

The Defendant defended the action on the ground of uſury, under the following circumſtances:—

In Hilary Term 1799, the preſent Plaintiff had brought an action againſt the Defendant, which had been referred to arbitration: the arbitrators had made an award for 500 *l.* in favour of the Plaintiff but had by miſtake awarded to him the coſts of the award, intending to have given him the coſts of the reference: this on taxation made a difference of 30*l.* againſt the Plaintiff, being the difference between the taxed coſts and the coſts out of pocket.

The money not being paid according to the award, the Plaintiff was preparing to proceed againſt the Defendant; when the latter came forward and propoſed to the Plaintiff, that if the Plaintiff would take his bills at a diſtant day for the ſum awarded and the taxed coſts, that he would pay the coſts out of pocket, and include them in the amount of the bills to be drawn. The Plaintiff conſented, and on one of the bills ſo drawn, the preſent action was brought; the Defendant contending, that the 30*l.* being

being given for forbearing the payment and exceeding the rate of *5l. per cent.* for the time, was uſury, and made the bill void, in which that ſum was included.

Lord KENYON, on the caſe being ſtated, was of opinion that it was not uſury; and there being no other defence, the Plaintiff had a verdict.

Law, *Conſt*, and *'Eſpinaſſe* for the Plaintiff.

Erſkine, *Garrow*, and *Marryatt* for the Defendant.

PARR *v.* ELIASON *et alt.*

Where the aſſignees of a bankrupt become *bona fide* poſſeſſed of a bill of exchange by the payment by it of a debt due to the bankrupt-eſtate, which bill had in the courſe of its negociation been in the poſſeſſion of the bankrupts, and on the diſcounting of which they took uſurious intereſt, that ſhall not impeach the aſſignees title to it.

THIS was an action of trover for a bill of exchange, againſt the Defendants, as the aſſignees of *Perſaint* and *Bodecker*, who were bankrupts.

On the 18th of *June*, 1799, the Plaintiff, who was the holder of the bill, applied to the houſe of *Perſaint* and *Bodecker*, to diſcount it for him; which they conſented to do, on the terms of the Plaintiff taking part in caſh, and part in their acceptance at three months of a bill to be drawn on them by the Plaintiff. The Plaintiff agreed to thoſe terms, and indorſed the bill to them, they taking the whole diſcount, without any allowance for the intereſt of their own bill at three months, which they gave to the Plaintiff.

Perſaint and *Bodecker* indorſed this bill away in the courſe of their trade, and it came into the hands of a debtor to their eſtate, who paid it in diſcharge of that debt to the Defendants as the aſſignees, in diſcharge of that debt. The bill at three months, which had been drawn by the Plaintiff,

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on *Perſaint* and *Bodecker*, was not paid by them when due; and the Plaintiff was under the neceſſity of taking it up himſelf.

It was ſtated by the Plaintiff's counſel, as the ground of his right to recover, that the bankrupts had become poſſeſſed of this bill uſuriouſly, by taking the full diſcount without any allowance for the intereſt on their own acceptance, which had three months to run; and which too was given as a part conſideration for the original bill, and never paid. That the ſtat. 12 *Ann*, having declared all aſſurances for payment of money lent on uſury to be void, *Perſaint* and *Bodecker* could claim no property in the bill, nor of courſe could their aſſignees who ſtood poſſeſſed of their rights only, and ſubject to all legal claims which could be made againſt them.

Lord KENYON. The bill has not come to the hands of the aſſignees immediately from the bankrupts, it was indorſed by *Perſaint* and *Bodecker* for a valuable conſideration; the holder became legally poſſeſſed of it, and has indorſed it to the Defendants in the payment of a debt. The ſtatute has declared all ſecurities void which have their foundation in uſury when they are firſt created; but uſury in any intermediate ſtage of negotiation, ſhall not make a bill void in the hands of a *bona fide* holder, who has given for it a *bona fide* conſideration untainted with uſury. I remember an old caſe, I think it is in *Siderfin*: that a conveyance which might be deemed as againſt a purchaſer fraudulent and void-

able,

able, yet might by matter *ex post facto*, be protected and made valid by the title of a subsequent *bona fide* purchaser. In this case the assignees derive their title to the bill from a *bona fide* holder; and they have a right to call his title in aid of their own, and for its protection. In the creation of this bill I see no usury. The constructions on the statute of *Ann*, have declared all securities founded on usury, void in the hands even of *bona fide* indorsers: that is not the case here: the defendant's immediate title to the bill is affected with no usury; and I am of opinion the Plaintiff must be called.

Nonsuit.

Law and *Wood* for the Plaintiff.

Erskine, *Gibbs*, and *Taddy* for the Defendants.

East. Rep. 92. S. C.

In the next term the Plaintiff moved to set aside the nonsuit; but the court concurred in opinion with Lord KENYON.

Vide *Cuthbert* v. *Haley*, 8. T. Rep. 390. *Pergers* v. *Laughan*, 1 Sid. 133. *Lowther* v. *Carleton*, Case in Eq. temp. Lord *Talbot*, 187. *Ferral* v. *Sheen*, 1 *Saund.* 294.

SITTINGS

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

BREWER *v.* PALMER.

ASSUMPSIT for uſe and occupation.

The Plaintiff, by a witneſs, proved the occupation by the Defendant of the premiſſes; but on his croſs-examination it came out, that there had been an agreement in writing; but it was ſtated that it was not ſtamped.

Where premiſſes have been demiſed by an agreement in writing, but not on ſtamped paper, the Plaintiff is bound to give the writing in evidence; and if not ſtamped at the trial, the Plaintiff ſhall be nonſuited, and ſhall not be allowed to go uſe and occupation generally.

The Plaintiff's counſel contended, that the agreement not being ſtamped, was to be deemed as no agreement, and not binding on the parties; and that he might therefore relinquiſh it, and be at liberty to go into evidence, generally, for the uſe and occupation.

Bailey, Serjt. for the Defendant, contended, that as it appeared the Defendant enjoyed the premiſſes under a written contract, the Plaintiff was bound to give it in evidence.

Lord ELDON ruled, That the Plaintiff was bound to give it in evidence: That the terms under which the Defendant held, being a ſpecific contract between the Plaintiff and him, the Plaintiff was bound to ſhew what that contract was; it might contain ſome clauſes which might prevent the Plaintiff from recovering, and others for the benefit of the Defend-

ant, which he had a right to have produced; but that not being ſtamped, no evidence could be given of it, and the Plaintiff ſhould be nonſuited.

Shepherd, Serjt. and *Conſt* for the Plaintiff.

Bailey, Serjt. for the Defendant.

Same day, *July* 11.

PEARCE *v.* ROGERS.

When the maſter of a family is in the habit of paying ready money for articles furniſhed in certain quantities to his family, if the tradeſman ſuffers other goods of the ſame ſort to be delivered, without informing the maſter, or ſatisfying himſelf that they were for his uſe, when in fact they were not, the maſter ſhall not be liable.

ASSUMPSIT for goods ſold and delivered.

The action was brought by the Plaintiff, who was a publican, to recover from the Defendant the amount of a ſcore for beer, furniſhed to the Defendant's family.

The circumſtances of the caſe were,—That the Defendant, who reſided in the ſame village with the Plaintiff, dealt with him for the porter uſed in his family; that the Defendant was in the habit of paying ready money to the Plaintiff for a certain quantity of porter, which was allowed for the family; and, in fact, though the beer for which the action was brought had been delivered at the Defendant's houſe, it had been carried in clandeſtinely by the maid-ſervant, for her own uſe and that of the Defendant's wife's mother; but it did not appear that the Plaintiff knew of this circumſtance.

Lord ELDON ſaid, that to allow ſuch a demand, would be to put it in the power of ſervants and tradeſmen to ruin the maſter. That where the maſter was in the habit of paying ready money for part of the goods furniſhed, it was ſufficient notice

to

to the tradeſman, that he conſidered thoſe only as furniſhed to his family; to put the tradeſman on his guard, and to make it incumbent on him to ſatisfy himſelf that the goods were really for the uſe of the maſter's family: that where the tradeſman ſuffered his goods to be ſo delivered, and without informing the maſter, if in point of fact they did not come to his uſe, he ſhould hold him not to be liable: that in this caſe, the porter not having been delivered to the Defendant's uſe, there was, in his opinion, no pretext to charge him.

The Plaintiff was nonſuited.

Cockell, Serjt. and *Reader* for the Plaintiff.

Shepherd, Serjt. and *Jervis* for the Defendant.

SINGLETON *et alt.* *v.* BUTLER.

ASSUMPSIT for money paid to the Defendant's uſe,—money had and received, with the uſual money-counts.

Where a trader, having accepted a bill for the uſe of a third perſon, is induced by that perſon to pay the bill, after having informed him that he was inſolvent, on the promiſe of ſuch perſon to guarantee the payment of a compoſition to the trader's creditors, and he afterwards becomes bankrupt, that payment is a fraudulent preference.

The action was brought by the Plaintiffs, who were the aſſignees of one *Howell*, a bankrupt, to recover the amount of ſums paid by the bankrupt, under the following circumſtances:—*Butler*, the Defendant, in *February*, 1799, applied to the bankrupt *Howell*, to accept a bill for him; to which *Howell* conſented; and accordingly a bill was drawn by *Butler*, in his own favour, on *Howell*, three months after date. The bill was drawn and

dated the 1ſt of *March*, and of courſe fell due the 4th of *June* following.

Two days previous to the bill becoming due, *Howell*, the bankrupt, came to the Defendant *Butler*, and ſtated to him, That from ſeveral ſevere loſſes which he had had, he would be unable to take up the bill: that his affairs were in a bad ſtate, and that he could not pay more than 10*s.* in the pound. *Butler* the Defendant, ſaid to *Howell*, The bill muſt be taken up by him; and that if he would do it, he (*Butler*) would be ſecurity to his creditors for the compoſition he would propoſe to give them. *Howell* was by this induced to pay the bill; and on the 5th of *June* he became bankrupt.

This action was therefore brought to recover back this money, as paid by *Howell* in fraudulent preference to his other creditors, and at the time when he was inſolvent, and that fact known to the Defendant.

For the Defendant it was inſiſted, that a debtor might, though inſolvent, pay a creditor, if it was in conſequence of the creditor's application; which point had been ſettled in the caſe of *Smith* aſſignee of *Hamilton* v. *Payne*, 6 Term Rep. 152; in which caſe a quantity of books had been delivered to the Defendant, in diſcharge of his debt, and after he was informed of the bankrupt's then inſolvency: yet that was held to be good. So here *Howell* was induced to pay the bill, from *Butler*'s inſiſting it ſhould be paid; which he had a right to do, as *Howell* was the acceptor of the bill.

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Lord ELDON said, he was of opinion that this was a fraudulent preference. In this case the payment was made in consequence of the bankrupt's calling on the Defendant; not of the Defendant's coming to him, and insisting on the payment; and the inducement held out was, the service to be rendered to him by *Butler*'s becoming security to his creditors. It therefore differed from *Smith* v. *Payne*, for there the money was actually due; besides this, there was a circumstance in evidence, of an alteration in the bill, which though not brought home to the Defendant, had an appearance of fraud.

Verdict for the Plaintiff.

In the next Term a new trial was moved for; and the other Judges concurred with Lord ELDON. Vide 2 *Bos.* and *Pull.* 283. S. C.

END OF TRINITY TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS,

ON THE

HOME CIRCUIT.

SUMMER ASSIZES, 1800,
AT HERTFORD,
CORAM LORD KENYON.

July 28th.

CLARK, Esq. v. TAYLOR.

In an action of debt on the game laws, the parish laid in the declaration is only for a venue; and the Plaintiff may prove the Defendant guilty at any other parish within the county.

THIS was an action of debt on the game-laws, to recover from the Defendant the penalties for killing game, he not being qualified, and not having a licence.

The declaration stated the offence of killing the game, to have been committed in the parish of *Hippolitts*, in the county of *Herisford*.

The Plaintiff having proved that the Defendant had killed the game on his manor, the counsel for the Defendant were directing his cross-examination of the witnesses as to the place, suggesting that it was not in the parish of *Hippolitts*, as laid in the declaration, but in an adjoining parish.

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They were interrupted by Lord KENYON, who ſaid, it was of no importance. When part of the penalty was given to the poor of the pariſh, then there it was matter of ſubſtance, and the offence was neceſſarily laid in the proper pariſh; but as the penalty was not now ſo diſpoſed of, the pariſh was only laid as a *venue*; and the Plaintiff might prove the Defendant guilty at any other pariſh within the county.

The Plaintiff had a verdict for one penalty.

Garrow and *Eſpinaſſe* for the Plaintiff.

Shepherd, Serjt. for the Defendant.

MAIDSTONE,
CORAM LORD KENYON.

MERCER *v.* WISE *et alt.* *Aug. 4th.*

THIS was an action of trover, brought by the Plaintiff, who was a bankrupt, againſt the Defendants, who were the aſſignees choſen under his commiſſion, and the auctioneer by whom his effects were ſold under it: the object of the action was to try the validity of the commiſſion which had iſſued againſt him.

A trader who has been declared a bankrupt, does not preclude himſelf from trying the validity of the commiſſion in an action againſt the aſſignees, by having ſurrendered under the commiſſion, and by having preſented a petition to the Chancellor to enlarge the time or his ſurrender.

The Plaintiff proved the taking of the goods mentioned in the declaration, which had been his pro-

perty before the bankruptcy; and there reſted his caſe.

The Plaintiff had been declared a bankrupt in *November*, 1799: he had applied to enlarge the time for his ſurrender, which had been granted; and he had actually ſurrendered and paſſed his laſt examination at the enlarged time. On theſe facts the Defendants counſel contended, that the Plaintiff had, by his own acts, eſtopped himſelf from conteſting the commiſſion, by having ſurrendered under it, and thereby admitted that it had legally iſſued; beſides which, they produced an office-copy of the petition itſelf, preſented by the Plaintiff to the Lord Chancellor, in which he ſtated, "That a "commiſſion of bankruptcy had been awarded "and iſſued againſt him, under which he had *been* "*duly declared a bankrupt*;" and praying that the time for his ſurrender might be enlarged.

Lord KENYON ſaid, that he ſhould not hold this to preclude the Plaintiff from conteſting the legality of the commiſſion which had iſſued againſt him. That being declared a bankrupt, whether rightfully or not, he was bound to ſurrender to it under the terrors of committing a felony; which he would have incurred, had he not ſurrendered. That, as therefore his apparent acquieſcence under the commiſſion was from neceſſity, he ſhould not hold the ſurrender an acquieſcence in the legality of the commiſſion, but leave him at liberty to conteſt it. That as to the words of the petition, which were preſſed by the Defendants counſel, as evidence

of

of his ſubſcribing to the legality of the commiſſion, they were the formal words of the petition, and merely of courſe.

The Defendants then proved the trading, the act of bankruptcy, the petitioning creditors debt, and the other uſual ſteps under a bankruptcy, in ſupport of the commiſſion.

The Plaintiff's counſel were then proceeding to invalidate that commiſſion of bankruptcy, by ſhewing an act of bankruptcy prior to that upon which the exiſting commiſſion was founded.

Where a commiſſion of bankruptcy is regularly proved, it ſhall not be in the power of the bankrupt himſelf to defeat it by ſhewing a prior act of bankruptcy committed by him, but upon which no commiſſion iſſued.

This was objected to by the Defendants counſel, who contended, that this evidence was inadmiſſible: that it was not competent for the bankrupt himſelf to impeach the validity of the exiſting commiſſion, by ſhewing that he was a bankrupt at an antecedent time: That if this was allowed, traders might defeat every commiſſion of bankrupt iſſued againſt them, by having a pocket-act of bankruptcy to be produced at a future time, in order to defeat a regular bankruptcy, as it ſuited their intereſt or not, to get rid of it.

Lord KENYON ſaid, he was of opinion that the Plaintiff could not go into ſuch evidence: it might be competent for a third perſon, who might be affected by the commiſſion, to endeavour ſo to impeach it; but that the preſent commiſſion having been regularly eſtabliſhed, in all its requiſites, it was not in the power of the bankrupt himſelf to attack it, by ſhewing a preceding act of bankruptcy committed by him, which had not been acted upon.

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At the inſtance, however, of the Plaintiff's counſel, who preſſed it, his Lordſhip permitted them to attempt the proof propoſed; but they failed in it, and the Defendants had a verdict.

Shepherd, Serjt. *Bailey*, Serjt. and *'Eſpinaſſe* for the Plaintiff.

Beſt, Serjt. and *Marryatt* for the Defendants.

CASES

ARGUED AND RULED

AT NISI PRIUS,

MICHAELMAS TERM, 41 GEO. III.

IN THE

KING'S BENCH.

SECOND SITTINGS IN TERM.

MEYMOT *v.* SOUTHGATE.

Monday, *Nov.* 17.

The penalty given by the ſtatute 14 *Geo.* III. chap. 78, ſect. 67, is recoverable againſt the maſter-builder, where the regulations of the ſtatute, and not againſt the proprietor of the premiſſes.

THIS was an action of debt, brought to recover a penalty of 10*l.* given by the ſtatute 14 *Geo.* III. chap. 78, ſect. 67; by that ſection, it is enacted, "That every maſter-workman, or other perſon, who "ſhall build, or cauſe to be built, any houſe, or "any addition to any houſe, &c. ſhall, within "fourteen days after ſuch houſe, &c. ſhall be "covered in, cauſe the ſame to be ſurveyed by the "ſurveyor of the diſtrict, &c. &c. under a penalty "of 10*l.*"

The breach of the ſtatute imputed to the Defendant, and on which the Plaintiff grounded his right to recover was,—That the Defendant, being a proprietor of an houſe in the borough of *Southwark*, had not given the notice required by the ſtatute; he having built and covered in an addition to it.

Garrow, for the Defendant, on the evidence being given to the above effect, objected: that the action

action was not maintainable. That the action had been misconceived; and arose from misreading the statute. That the Plaintiff had read the act of parliament, "*Master*," with a stop after it, "*Workman*," &c.; whereas the words of the act are, "*Master-Workman*," not the man whose house was built, who knew nothing of the way in which the building was conducted, but the master-workman who superintended the building of it; he was the person who, in reason and in law, ought to be liable to any penalty inflicted by the act. It would be a matter of infinite hardship if the proprietor of the house, who might never have seen it, who had given up the whole conduct of the building of it to another, should, by his acts, be subjected to a penalty.

It was answered by the Plaintiff's counsel, that whatever might be the reading as to these words, whether to be taken together or not, the meaning of the act was to subject the proprietor; for the words of the statute were, "built, or *caused to be built*;" which latter words certainly applied to the proprietor, though the word *built* might apply to the workman only.

Lord KENYON said, he was of opinion that the construction contended for by the Defendant's counsel was the true one. It was impossible to suppose that it could be meant to subject a party to a penalty who had nothing to do with the act which had caused it; as the owner might live at a distance, and never interfere with the erection. That as to the words, *caused to be built*, which were urged as exclusively applying to the proprietor, they were equally applicable

applicable to the maſter-builder, who ſuperintended and directed the work, and who ought to have taken care that the act of parliament had been complied with. That he was therefore of opinion the action was miſconceived, and the Plaintiff ſhould be nonſuited.

Nonſuit.

Mingay and *Maryatt* for the Plaintiff.

Garrow and *Harriſon* for the Defendant.

REDPATH *v.* ROBERTS.

Same day.

ASSUMPSIT for uſe and occupation of certain apartments in the Plaintiff's houſe.

In aſſumpſit for uſe and occupation of apartments which the Defendant had quitted without giving notice, the Plaintiff having put up a bill to let the apartments, will not prevent his recovering.

The action was brought to recover half a year's rent of the premiſſes, from *Midſummer* to *Chriſtmas*; the Defendant having (as the Plaintiff inſiſted) quitted at *Midſummer* without giving any notice.

The Defendant's counſel attempted to prove, that after the Defendant had quitted at *Midſummer*, the Plaintiff had put up a bill at the window, and endeavoured to let the lodgings; but they were in fact not let. This, it was contended, was exerciſing a right to diſpoſe of the apartments for the time it was ſuppoſed they belonged to the Defendant; and evidence that the contract was put an end to at *Midſummer*.

Lord KENYON ſaid, that would afford no anſwer to the Plaintiff's action. It was for the benefit of the Defendant that the apartments ſhould be let; nor

nor would he infer from the circumſtance of the party's endeavouring to let them, that the contract was put an end to; that there muſt be other circumſtances to ſhew it, and not an act of ſo equivocal a kind. That as the Plaintiff had proved the taking of the premiſſes, and the payment of the rent, it was incumbent on the Defendant to prove that tenancy put an end to by expreſs evidence.

The Defendant then did prove an expreſs notice to the Plaintiff, that ſhe would quit at *Midſummer*, and the acquieſcence in it by the Plaintiff; and had a verdict.

Mingay and *'Eſpinaſſe* for the Plaintiff.

Garrow and *Wingfield* for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

Nov. 29th. ## POSTLETHWAITE *v.* GIBSON and SLADE.

When the ſtat. 24 *Geo.* II. chap. 44, orders that actions brought againſt conſtables, ſhall be commenced within ſix months after the offence committed, it extends to caſes only where the conſtable is acting under a warrant from a juſtice of peace.

THIS was an action of aſſault and falſe impriſonment.

Plea of Not Guilty.

The Plaintiff proved,—That on *Sunday*, the 20th of *January*, 1799, he was taken into cuſtody by the Defendants, one of whom was a conſtable, at *Tooting* in *Surry*, on ſuſpicion of having committed a burglary. That he was kept in cuſtody from that day till the *Wedneſday* following, when, being brought before a juſtice of peace, he was diſcharged: and that he was taken into cuſtody without

out any warrant having been granted, directed to any conſtable or other perſon to apprehend him.

The action was commenced in the month of *February*, 1800.

It was objected by *Garrow* of counſel for the Defendants: that the action had been commenced after the limitation preſcribed by the ſtatute, 24 *Geo.* II. chap. 44; by which it is ordered, That all actions againſt conſtables, ſhould be commenced within ſix months after the offence committed; and that the Plaintiff ſhould therefore be nonſuited.

It was anſwered by the Plaintiff's counſel, that the ſtatute did not apply to the preſent caſe; that it applied to the caſes only where the conſtable was acting under the warrant of a juſtice of peace: whereas, in the preſent caſe, he was proved expreſsly to have been acting without any warrant whatever.

Garrow then contended, that if the Defendant was acting as a conſtable, by virtue of a charge given to him, he was entitled to the protection of the ſtatute.

Lord KENYON, after referring to the ſtatute, ſaid, I am afraid I muſt hold that the ſtatute does not extend to protect the Defendants. It is ſtrange that the ſtatute ſhould give a protection to juſtices of the peace, who are perſons of more knowledge and experience than conſtables, and not to perſons of the latter deſcription. But I am bound by the words of the ſtatute, which applies to caſes only where there has been a warrant granted by a juſtice of peace, and the conſtable is acting under it; not to caſes where there has been a charge only.

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The Defendants were proceeding to give evidence in mitigation of damages, of the grounds of their ſuſpicion under which the Plaintiff had been taken into cuſtody, when his counſel conſented that he ſhould be nonſuited.

Gibbs and *Comyn* for the Plaintiff.

Garrow, *Knowlys*, and *Clifton* for the Defendants.

Dec. 3.

JOLLY *et alt.* Aſſignees of NORTON, *v.* WALLIS.

Where a compoſition-deed or inſtrument is entered into by an inſolvent, with a clauſe, that if certain creditors do not ſign the deed, it ſhall be null and void; if ſuch creditors accept of the compoſition, or the ſecurity for the compoſition, though they do not actually ſign the inſtrument, it is valid and good.

THIS was an action of aſſumpſit, brought by the aſſignees of one *Norton*, a bankrupt, to recover the amount of ſeveral ſums of money, alleged to be the property of the bankrupt, which had come to the hands of the Defendant.

The caſe, as it appeared in evidence, was,—That on the 15th of *October*, 1798, *Norton*, having got into difficulties, called a meeting of his creditors: an agreement was then entered into, reciting, that a ſtate of *Norton*'s affairs having been arranged and laid before the creditors by Mr. *Wm. Wallis* (the Defendant) and a propoſal having been made by *Norton*, to pay a compoſition,—the creditors then preſent agreed to accept of 9*s.* in the pound for their reſpective debts, payable by three inſtallments; at four, ten, and fifteen months, with ſatisfactory ſecurity for the laſt payment; and *Norton* thereby agreed to pay into the hands of a banker, in the names

names of *Harris*, *Rogers*, and the Defendant, the ſum of 100*l.* every month; and in default of ſo doing, the creditors were to be at liberty to take all *Norton*'s goods. And it was further agreed, That if all the creditors, whoſe debts amounted to 5*l.* did not ſign the agreement on or before the 15th day of *November* following, the agreement was to be null and void: and that in the mean time, *William Wallis* (the Defendant) or his repreſentative, were to continue at the houſe of *Norton*, on behalf of the creditors; and ſhould have liberty, from time to time, to examine the accounts, for the ſatisfaction of the creditors.

In conſequence of this agreement, *Norton* gave his notes for the payment of the inſtallments, and procured a Mr. *Willis* to join in a bond to *Rogers*, *Harris*, and the Defendant, for ſecuring the laſt inſtallment: this became due on the 15th of *February*, 1800.

Norton's notes, for the two firſt inſtallments, were regularly paid; and 400*l.* part of the laſt inſtallment, ſecured by the bond, was depoſited in the bankers hands, in the names of the Defendant, and of *Rogers* and *Harris*, the two other perſons who were joined with him.

A commiſſion of bankruptcy afterwards iſſued againſt *Norton*. The act of bankruptcy proved, on opening the commiſſion, was by abſconding about the ſecond week in *February*, 1800.

Wallis, the Defendant, was examined before the commiſſioners, under *Norton*'s commiſſion; the commiſſioners were of opinion, that the agreement

was void; and the preſent action was brought to recover back the 400*l.* paid for the laſt inſtallment. This had been paid by *Norton*, by different payments of 100*l.* a month; *viz.* on the 12th of *October*, 12th of *November*, and 12th of *December*, of the year 1799; and on the 14th of *January*, 1800.

An agreement to accept a compoſition, where there is no aſſignment of the trader's effects, is not an act of bankruptcy.

Lord KENYON aſked the counſel for the Plaintiff, If they meant to rely upon this agreement as an act of bankruptcy? Conceiving that the counſel meant ſo to contend, he ſaid, he was of opinion, it was not an act of bankruptcy. It was not an aſſignment of all the party's effects which was an act of bankruptcy; it was an arrangement which a man might enter into from the temporary preſſure of his affairs, but would not make him a bankrupt.

Erſkine, counſel for the Plaintiff, then ſaid, That he meant to contend, that the agreement was void. It was provided that it ſhould be void, if every creditor whoſe debt amounted to 5*l.* did not ſign it; and he ſhould prove, that all the creditors of that deſcription did not ſign the agreement: and from thence he contended, that if a trader pays into the hands of a truſtee, money to be divided among the creditors, in the manner ſettled by any deed or agreement, and the inſtrument becomes void by reaſon of all the creditors not coming in, that that money was recoverable back by the aſſignees, in caſe of ſuch trader becoming a bankrupt.

To prove this caſe, he called a witneſs, who proved, that there were two creditors, one of the name of *Payne*, who was a creditor for 40*l.*, who had not ſigned the agreement; but he admitted,

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in his croſs-examination, That though they had not ſigned the agreement, they had accepted the notes given for the payment of the inſtallments, purſuant to it.

Per Lord KENYON. If the creditors have all come in, and taken the ſecurity propoſed by the agreement for the compoſition, though they have not actually ſigned it, I ſhall hold that they have acquieſced in the compoſition, and conſented to come in under it. It would be ſo held in the other ſide of the hall. It is proved, that the only two creditors who have not ſigned the deed, have, however, accepted of the notes given by the compoſition: that, in my opinion, binds them. The agreement is therefore not void, and the Plaintiffs cannot recover.

Verdict for the Defendant.

Erſkine and *Lawes* for the Plaintiff.

Garrow and *Wood* for the Defendant.

MILLER *v.* ARIS.

Dec. 6.

ASSUMPSIT for money had and received.

Plea of *Non-aſſumpſit.*

This was an action brought againſt the Defendant, who was governor of the priſon in *Cold Bath-Fields*, to recover a ſum of money paid by the Plaintiff, for lodging and victuals, while he was confined as a priſoner in that place of confinement.

This priſon is under the regulation of the magiſtrates of the county of *Middleſex*, by whom a particular

Where, by the regulations of a priſon made by the magiſtrates, certain rates are ſettled for lodging, &c. within the priſon, the gaoler cannot take more than that ſum; and if he does, he ſhall be liable to refund it, though he has paid it over to the magiſtrates, to whom he accounts.

ticular code of printed regulations is framed for its government.

By the 25th rule of thoſe printed regulations, "The governor is allowed to demand of every perſon committed for ſafe cuſtody only, and not in execution, and requiring to be lodged in a better manner than the reſt of the priſoners, and able to pay for a bed, the ſum of 1s. for a night; and to keep one or more beds always fit for uſe, in caſe ſuch beds ſhould be wanting." It was proved, That the Plaintiff, having had one of thoſe beds while he was in cuſtody, had been charged and paid for it one guinea *per* week: to recover the overplus of which ſum, above that ſettled by the rule, was one of the articles of the Plaintiff's demand.

By another of thoſe printed regulations, the governor is prohibited from furniſhing the priſoners with victuals, or contracting for the ſame. The Plaintiff, during the period of his confinement, had been charged, and paid for victuals: to recover the money ſo paid, conſtituted the ſecond article of his demand.

In anſwer to the demand for lodging, the Defendant relied, That he accounted at the ſeſſions, to the county, for the ſums received on account of the gaol. That the charge of one guinea *per* week was ſanctioned by uſage, and authorized by the juſtices who paſſed the accounts: and he gave in evidence the book kept for that purpoſe, containing the account of the lodging of the ſeveral priſoners; and which book was furniſhed to the magiſtrates, and contained the charge in queſtion.

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The ſecond demand for victuals was completely diſproved; it appearing that the cook of the priſon was the perſon ſolely intereſted in providing the victuals.

Lord KENYON. For the demand for the victuals, the Plaintiff cannot recover: but I am of opinion, that the action is maintainable for the overplus money paid on account of the lodging. It is relied on for the Defendant, That he is merely an agent, receiving the money from the priſoners, and paying the produce to the county. The caſe of *Sadler* v. *Evans*, 4 *Burr.* 1985, is relied on; it has been ſo laid down by very high authority in that caſe, that where money has been received by an agent, you cannot ſue him, but muſt have recourſe to the principal; but that is where there is no corruption in the foundation of the contract; nor is it bottomed in oppreſſion or immorality.

The rules for the regulation of this priſon are properly made; but priſons are not places where priſoners are to have all the conveniences and comforts of life. Gaolers are bound to treat their priſoners with humanity; but the regulations framed for the priſon, ought to be conformed to. Theſe regulations have pointed out what ſums ought to be taken: it ſhould not be in the power of the gaoler to diſpenſe with thoſe regulations, and to enter into contracts with thoſe in their cuſtody, and under their controul: to allow that, might be to ſanction oppreſſion. In caſes of uſury, the perſon whoſe neceſſities prompt him to borrow, will enter into any improvident contract whatever, and ſubmit

to any terms, however exceſſive, to procure money; but the law will protect him, and not ſuffer it. In this caſe, I think, the law will interpoſe in the ſame way, and not permit ſuch an agreement to be entered into. I am therefore of opinion, that the Plaintiff is entitled to recover the money paid for the lodging, above the ſum allowed by the regulations.

The Defendant's counſel, upon his Lordſhip's thus delivering his opinion, as to the law of the caſe, offered in evidence a general releaſe, given by the Plaintiff to the Defendant.

It was objected by the Plaintiff's counſel; that this could not be given in evidence under the general iſſue; that beſides, it was fraudulent, being given on account of other tranſactions between the parties, and not on account of the preſent, or with any view to it.

Lord KENYON ſaid, that it was competent for the Defendant, in this action, to give a releaſe in evidence, under the general iſſue; but that it was alſo competent for the Plaintiff to impeach it on the ground of fraud.

It was accordingly given in evidence, and *Erſkine* went to the jury on the ground of fraud; but the jury found for the Defendant.

Erſkine and *Lawes* for the Plaintiff.

Garrow, *Gibbs*, and *Marryatt* for the Defendant.

SITTINGS AFTER TERM AT GUILDHALL.

ROBINSON *v.* HINDMAN.

ASSUMPSIT for ſervants wages.

If a maſter turns away a ſervant, without a previous notice or warning, the ſervant is entitled to a month's wages.

The action was brought by the Plaintiff, to recover the amount of a month's wages, on the ground of his having been diſcharged, by the Defendant, without any notice or warning.

No agreement was proved to the effect of the claim; but general uſage only was relied on.

The Defendant proved, that the Plaintiff was negligent in his conduct, frequently abſent when his maſter wanted him, and often ſlept out at nights.

Lord KENYON ſaid, that though in the preſent caſe he thought the Plaintiff was not entitled to recover, on account of his miſconduct, he was of opinion, that if a maſter turned away his ſervant without warning, or previous notice, and there was no fault or miſconduct in the ſervant to warrant it, he ought to have the allowance claimed, of a month's wages; which he thought reaſonable.

Verdict for the Defendant.

Garrow and *Peake* for the Plaintiff.

Erſkine and *Roſe* for the Defendant.

FOULKES *v.* SELLWAY.

In an action for breach of promiſe of marriage, where the defence is, that the Plaintiff was a woman of bad character, the character which a witneſs heard of her in the neighbourhood where ſhe lived, is good evidence.

CASE for breach of a promiſe of marriage.

The defence was,—That the Plaintiff was a woman of bad character; and evidence was given of one inſtance of groſs miſconduct.

The Defendant's counſel then called a witneſs to prove, That ſhe was a woman of general bad character.

The witneſs gave evidence of his having gone to the place where ſhe lived, to enquire into her character, and was proceeding to ſtate what he had there heard.

Garrow, for the Plaintiff, objected to this evidence. That the witneſs ſhould not be allowed to give evidenceof what he heard from third perſons; if they, from their own knowledge, knew the Plaintiff's character, they ſhould be called to ſtate it, and their repreſentations ſhould not be taken at ſecond-hand, as the Plaintiff was thereby prevented from croſs-examining the witneſſes as to their reaſons for the character they gave.

Lord KENYON ſaid, he was of opinion the evidence was admiſſible. Character here was the only point in iſſue. That was public opinion, founded on the conduct of the party, and was a fair ſubject of enquiry; he therefore thought, that what that public thought, was evidence on the iſſue as it then ſtood.

The Defendant had a verdict.

Garrow

Garrow and *Lawes* for the Plaintiff.
Erſkine for the Defendant.

HERNE *et alt.* *v.* HALE.

ASSUMPSIT to recover the ſum of 55*l.* 2*s.* 5½*d.* the difference on the price of ſtock.

A memorandum on the back of a debt, altering ſome of the terms of it, does not require to be ſtamped.

The ſiſter of *Herne*, one of the Plaintiffs, being about to marry *Grigg*, the other Plaintiff, the Defendant agreed to advance 1000*l.* as a marriage portion; and to ſecure it, the Plaintiffs entered into a deed, dated the 1ſt of *Auguſt*, 1792, by which (among other things) they agreed to transfer 2000*l.* three *per cents.* to the Defendant; which was accordingly done.

In the month of *January*, 1798, a memorandum was indorſed on the deed, by which it was agreed, that the Defendant ſhould not transfer, or otherwiſe diſpoſe of the ſtock, without giving ſix months notice to the Plaintiffs. This indorſement was not ſtamped.

Notice had been given in purſuance of this agreement, and the ſtock ſold; but there being a diſpute between the parties, as to what price the ſtock was to be taken, the preſent action was brought to try the queſtion.

Garrow, for the Defendant, took a preliminary objection to the Plaintiffs recovering; that the indorſement on the deed of 1792 was not ſtamped, and ſo could not be given in evidence. That

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it purported to control, and to make an alteration in the terms of that deed; ſo that ſubſtantially it was a new inſtrument, and required a new ſtamp and the neceſſary ſolemnities to give it effect.

Lord KENYON ſaid, he was of opinion, it did not require any ſtamp; and inſtanced the caſe of mortgage-deeds, in which it had formerly been cuſtomary to make indorſements, altering the rate of intereſt from 5 to 4 *per cent.*; on which occaſions a new ſtamp had not been held neceſſary. His Lordſhip therefore admitted it in evidence; and the Plaintiff had a verdict.

Erſkine and *Giles* for the Plaintiff.

Law and *Garrow* for the Defendant.

Eaſter. 16.

ROBERT HARRISON, Surviving Partner of THOMAS HARRISON, *v.* FITZHENRY.

Where there are ſeveral names compoſing a firm, but part are nominal only and not intereſted in the profits, in a declaration on a bond of indemnity, to ſecure money advanced to a third perſon, and the breach ſtates the money to be paid by the partners only who are intereſted in the profits, it is good, though the money was paid on bills drawn on the firm compoſed of all the partners.

DEBT on an indemnity-bond, given by the Defendant to *Robert* and *Thomas Harriſon*. The bond recited,—That one *Charles M'Carthy* having applied for and prevailed on the Plaintiff and his then partner to open a credit with their houſe, and to advance money, and accept bills on his account; the condition of the bond was, That if the ſaid *Charles M'Carthy* ſhould not pay all the money which the Plaintiff ſhould advance, and all bills of exchange drawn on them on his account, that within

within one month after notice given of the ſaid *Charles M'Carthy*'s default to the Defendant, or left at his houſe, that he would pay, &c.

The Defendant, after craving oyer of the bond and condition, pleaded *inter alia.* — Firſt, That *Charles M'Carthy* had paid all ſums of money advanced by *Robert* and *Thomas Harriſon* on his account, and all bills drawn by him on them. The Plaintiff replied, That he and his partner, *Thomas Harriſon*, had advanced and paid on account of *Charles M'Carthy*, a large ſum of money; to wit, the ſum of 1420*l.* and iſſue thereon. The Defendant 2dly pleaded, That he had not had reaſonable notice given or left at his houſe, of the default of *Charles M'Carthy*. Replication, That he had ſuch notice and iſſue thereon.

The Plaintiff proved the payment of ſeveral bills drawn by *Charles M'Carthy* on the houſe of *Robert* and *Thomas Harriſon* and Co. and ſeveral notes made payable there, drawn in *January*, *February*, and *March*, 1793, at different dates; and which he proved to be paid by them.

In anſwer to this the Defendant relied, that the houſe of *Robert* and *Thomas Harriſon* and Co. did not conſiſt of thoſe two perſons only, but that the firm conſiſted of them and two other perſons of the name of *Nichols* and *Prickett*. That the bills being drawn on the houſe of *Robert* and *Thomas Harriſon* and Co. and the notes being made payable by them, whatever money was advanced in diſcharge of either, was the money of *Robert* and *Thomas Harriſon* and their partners, and not that of *Robert* and *Thomas Harriſon*

Harriſon only, as the iſſue ſtood on the pleadings; and *Erſkine*, for the Defendant, cited *Myers* v. *Edge*, 7 Term Rep. 254.

It was anſwered for the Plaintiff, and proved by them in evidence, that the two perſons of the names of *Nicholls* and *Prickett*, and whoſe names appeared in the firm, were nominal partners only, and had no intereſt whatever in the profits, they being paid a certain ſum of money annually; and *Barber* v. *Parker*, 1 Term Rep. 287, was cited.

Mr. Juſtice LE BLANC* ruled this to be a ſufficient anſwer, and to entitle the Plaintiff to maintain the action, as ſurviving partner, in his own name only.

Where a party becomes ſecurity by bond, for the payment of money advanced to a third perſon, and by the condition of the bond is to pay after notice, if the party has left his houſe, it is ſufficient for the obligee of the bond to make reaſonable inquiries after him, and laches are not imputable to him if he does ſo.

With reſpect to the ſecond iſſue on the notice, the evidence was,—That the Defendant *Fitzhenry* had become a bankrupt in the month of *March*, 1793, and *Charles M'Carthy* in the *May* following; and the ſeveral defaults in payment had been made in the months of *February*, *March*, and *April* preceding; and the ſums then paid were thoſe which the Plaintiff ſought to recover by this action. No notice had been given to the Defendant, *Fitzhenry*, of theſe ſeveral defaults, until *Auguſt*, 1795. The Plaintiff's counſel accounted for this by ſhewing, that ſoon after his bankruptcy, the Defendant had left his houſe at *Briſtol*, where he had carried on trade:

* Lord KENYON was abſent during part of the Sittings at *Guildhall*. Mr. Juſtice LE BLANC ſat for his Lordſhip at *Niſi Prius*.

that

that he had gone to live in *Ireland*, where he had commenced buſineſs in the ſalt-trade, and that enquiries had been made for him, but without effect.

Mr. Juſtice LE BLANC. By the condition of this bond, the Defendant is entitled to notice of the default in payment by *Charles M'Carthy*, of the ſums advanced by the Plaintiff on his account; and which notice muſt be given in reaſonable time; and had it appeared that there had been groſs negligence on the part of the Plaintiff in giving that notice, I ſhould have held that it ſhould diſcharge him; but groſs negligence muſt have taken place to conſtitute a ſufficient ground to diſcharge the Defendant. In this caſe I do not think there has been ſuch negligence: however long the interval may be between the default of *M'Carthy* and the notice to the Defendant, it is capable of being explained by circumſtances. It is in evidence, that the Defendant left his houſe and went to reſide in another country, and the Plaintiff made enquiries after him, where he uſed to carry on his trade: this was a reaſonable degree of diligence in the Plaintiff; and as there is no evidence that he knew where the Defendant was to be found, I think he is entitled to recover.

Verdict for the Plaintiff. Damages 1420*l.*

Law, *Gibbs*, and *'Eſpinaſſe* for the Plaintiff.

Erſkine, *Mingay*, and *Higley* for the Defendant.

Dec. 19.

ABEL *v.* POTTS.

Where, by a memorandum of a policy, the underwriter was to adjuſt the loſs in three months after notice, a direct notice from the aſſured is not required, if he has had notice by other means.

THIS was an action on a policy of inſurance on wines, on board the *Daniſh* ſhip *Elizabeth*, warranted neutral property, from *Bourdeaux* to *St. Thomas*, as a neutral ſhip.

Loſs by detention of Princes.

The ſhip was taken by the *French*, and carried into *Guadaloupe*, where, the colony being in want of her cargo, they took it out, and compelled her to take in a cargo of the produce of that iſland, with which ſhe ſailed; ſhe was afterwards captured on the 20th of *September*, 1793, by a *Britiſh* ſhip, and carried into *Nevis*, where the cargo was condemned.

There was a memorandum on the policy, That the loſs was to be adjuſted within three months after advice of the ſhip being captured.

The Defendant relied on the circumſtance, That he had had no notice of the loſs of the ſhip.

The broker who effected the policy was called: he could prove no direct notice having been given to the Defendant; but ſaid, He had no doubt that notice had been given.

Lloyd's books are evidence of a capture, not of notice of a loſs to any perſon in particular; but coupled with other evidence, may go to the jury.

The Plaintiff's counſel then called for *Lloyd*'s book, wherein the capture of the ſhip was mentioned; and contended, that it was ſufficient notice to the Defendant.

Per

Per LE BLANC, Juſtice. *Lloyd*'s book is evidence of a capture, but it is no evidence of notice to a particular perſon.

The Plaintiff then proved that the Defendant was a ſubſcriber to *Lloyd*'s coffee-houſe, and a conſiderable underwriter; and was in the conſtant habit of examining the books at *Lloyd*'s, in which the capture was entered.

Law, for the Defendant, made two points: 1ſt, That no notice had been given to the Defendant ſufficient to ſatisfy the memorandum on the policy, the evidence of notice being inſufficient, as well as not being a direct notice from the aſſured, which he contended to be neceſſary: 2dly, That the ſhip having been captured and carried into *Guadaloupe*, there then was a total loſs, which the aſſured ought then to have abandoned, and which they had not done; and the loſs, in the declaration, being laid in *Guadaloupe*, no other loſs could be taken into conſideration.

Mr. Juſtice LE BLANC. As to the firſt point made by the Defendant's counſel, it does not ſtrike me that the communication of the loſs ſhould neceſſarily come from the aſſured; I think that if the underwriter had notice by any means of the loſs of the ſhip, that that would ſatisfy the memorandum of the policy. With reſpect, therefore, to the evidence of notice, it is this,—There is evidence that the loſs of this ſhip was publicly known; that ſhe ſtood on *Lloyd*'s books as a capture; and that the Defendant was a ſubſcriber to *Lloyd*'s, and in the habit of daily examining the books. Was the Defendant

Defendant the only underwriter in *Lloyd*'s coffee-houſe ignorant of the capture? In addition to this, there is the evidence of the broker, who ſwears that he believes the Defendant had notice, though he cannot ſpeak to it in direct terms. I think this evidence ſufficient to go to the jury. With reſpect to the ſecond point, That the aſſured ought not to have taken to the ſecond cargo which was impoſed on him, but to have abandoned it, — the propoſition of law is a true one, that if there is at any time a total loſs, and afterwards any change of circumſtances takes place, the aſſured is bound to make his election; and he cannot try to take advantage of it, and to be determined by the event, if it is profitable or not: but to make this rule of law attach on the caſe, it muſt appear that there was a time when the aſſured was conuſant of the change of circumſtances. There is no evidence of the Plaintiff's having taken to the ſecond cargo. It does not appear that the aſſured had any notice of the loſs until the veſſel was captured and carried into *Nevis*, on her ſecond voyage: at that time, therefore, he had nothing to abandon. I am therefore of opinion, that the policy is not diſcharged, by reaſon of the Plaintiff's not abandoning.

Upon the firſt notice of a total loſs, the aſſured are bound to abandon; but it muſt appear that they had notice, or the policy will not be vitiated.

The jury found a verdict for the Plaintiff.

Erſkine, *Gibbs*, and *Giles* for the Plaintiff.

Law, *Adam*, and *Park* for the Defendant.

WOOD *et alt.* Assignees of PEARCE, *v.* THWAITES.

Saturday, Dec. 20.

TROVER for a lease.

To prove the act of bankruptcy, the Plaintiffs called a witness, who gave in evidence, that a creditor called on the bankrupt: he was then at home, and was, by his own direction, denied to the creditor, who thereupon said, "he would wait for eight hours, or see him." After much importunity, the bankrupt did consent to see him.

A denial to a creditor, though the debtor afterwards sees him on the same day, is an act of bankruptcy.

This was put to Mr. Justice LE BLANC (who sat for Lord KENYON) as amounting to an act of bankruptcy.

His Lordship said, here is a denial to a creditor, that is an act of bankruptcy; and it is not purged by the bankrupt's seeing him afterwards, though in the course of the same day.

The defence set up was, that *Pearce* had a partner of the name of *Elwin*; that the lease was the joint property of *Pearce* and *Elwin*; and that *Elwin* had authorized the Defendant to retain it.

LE BLANC, Justice, ruled it to be a good defence.

Law, *Perceval*, *Adam*, and ——— for the Plaintiffs.

Garrow and *Gibbs* for the Defendant.

Same day.

KERSHAW *et alt. v.* COX.

Where a bill of exchange was put into circulation by indorsement, though it wanted the words "or order," the insertion of those words by the drawer, with the consent of the parties, neither vitiates the instrument, nor makes a new stamp necessary.

THIS was an action of assumpsit, brought to recover the value of a bill of exchange.

The bill was drawn by *Collier* and Son, in favour of the Defendant, who had indorsed and delivered it to one *Kershaw*, who was the son of one of the Plaintiffs: he was indebted to the Plaintiffs at the time; and remitted it to them in discharge of his debt.

The bill was dated the 1st of *August*. On the 2d of *August* the bill was sent back by the Plaintiffs, on discovering that the words "or order" were wanting; so that the bill could not be negociated by indorsement.

On receiving it back, *Kershaw*, the son, applied to the Defendant, who referred him to *Collier*; by whom the words "or order" were inserted. This was all done on the 2d of *August*, on which day the bill was returned to the Plaintiffs.

The bill became due the 4th of *November*. On the 16th of *August* preceding, *Kershaw*, the son, was informed by the Plaintiffs, that the bill had been refused acceptance; and he gave notice of it immediately to the Defendant, who insisted that the bill was a good one, and would be paid.

Before the bill became due, *Walley*, the drawee, and *Collier* became bankrupts. On the 7th of *November*, *Kershaw*, the son, received back the bill from the Plaintiffs, noted for non-payment: he took

took it immediately to the Defendant; who refuſed to pay it.

The bill was properly ſtamped.

Erſkine, for the Defendant, contended, that the Plaintiff ſhould be nonſuited: he relied, firſt, On the caſe of *Maſters* v. *Miller*, 4 Term Rep. 320. That the Defendant did not conſent to the alteration by *Collier*, which brought it within the caſe cited. That the alteration was in a material part, as it might change the right of ſet-off, by making that negotiable which was intended to go only in a particular account: but if it was not within that caſe, it was within the caſe of *Bowman* v. *Nicholls*, 5 Term Rep. 537; and a new ſtamp was neceſſary, by reaſon of the alteration in the inſtrument.

Mr. Juſtice LE BLANC. It can hardly be contended that the Defendant did not conſent to the alteration, making this a negotiable bill, as he himſelf indorſed it, and ſo conſidered it as negotiable; but this I will leave to the jury As to the ſtamp, I think no new ſtamp was neceſſary. This was not a new inſtrument, as in the caſe of *Bowman* v. *Nicholls*, but merely a correction of a miſtake, and in furtherance of the original intention of the parties. It would be different if the alteration had been in the date, or of the time when it was to be paid; that would be a material part; this, in my opinion, is not ſo, and does not vitiate the bill.

The jury ſaid, this ſort of alteration was very common; and found a verdict for the Plaintiff.

Law and *Littledale* for the Plaintiff.

Erſkine and *Garrow* for the Defendant.

A new trial was moved for in the courſe of the next term; but the court refuſed a rule to ſhew cauſe.

Same day.

PARKIN *v.* CARRUTHERS *et alt.*

Where a partnerſhip has exiſted, but one of the partners has retired without notice being given in the Gazette, and the name of the firm is ſtill preſerved; a perſon dealing with the firm after the diſſolution, may ſtill call upon all the original parties, unleſs he had notice, or knew that one of them had retired.

ASSUMPSIT on a promiſſory note for 800*l.*, ſigned by *Joſeph Parkin*, one of the Defendants, drawn the 10th of *July* 1798.

It appeared, that on the 29th of *April*, *John Campbell*, one of the Defendants, retired from the partnerſhip, and never after intermeddled with the trade; and the bill was drawn after he had ſo retired; but no notice of his retiring was publiſhed in the *Gazette*.

The defence was,—That the note was given for the ſeparate account of *Joſeph Parkin*, and not on the partnerſhip account.

Erskine, for the Defendant, contended, that notice in the *Gazette* could only affect antecedent tranſactions; but if a partner had retired from a firm, a party who never dealt with the houſe while ſuch partner was in the firm, could not call upon the credit of ſuch perſon as a partner, when in fact he was not ſo: admitting the principle, that if the perſon had dealt with the houſe before, if the diſſolution of the partnerſhip had not been made public, the party ſtill continued liable; the notice in the *Gazette* could only apply to thoſe who dealt with the houſe before.

Law, on the ſame ſide. The only evidence of the partnerſhip is by the deed of diſſolution that

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was in *April* 1798, and by that the partnership was recited; so that by the same instrument, by which it was proved that he was a partner, it appeared that he had ceased to be so at the time the note was drawn.

Gibbs, on the same side. The money was paid to *Joseph Parkin* as agent for the Plaintiff by Mr. *Booth*, who had that money to pay to the Plaintiff; and as he paid it to *Joseph Parkin*, the Defendant, who was one of the partners, this was legal notice to *Thomas Parkin*, the Plaintiff, that *John Campbell* was out of the partnership, as his agent knew it.

Le Blanc, Justice. Is not this a question for the jury? The firm continues the same. Have you made *Joseph Parkin* an agent?

Gibbs. I have constituted *Joseph Parkin* an agent; he received the money for his brother.

Le Blanc, Justice. The principle on which I proceed is this:—That there was a partnership subsisting, under the firm of *Parkin, Campbell*, and Co. which continued after the retirement of *John Campbell*. The rule of law is clear, that where there is a partnership of any number of persons; if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm.

In summing up to the jury, his Lordship laid it down as the law on the subject, That if the Plaintiff advanced the money, even after the time that one of the partners had retired, if he did not know of

ſuch retirement, he had a right to ſue all who before conſtituted the partnerſhip. In point of fact in this caſe, *John Campbell* had retired; but ſtill if this was really a partnerſhip, and the money was lent to the perſons carrying on trade under that firm, all were liable.

His Lordſhip added, I agree with the Defendants counſel, That if this money was lent by the Plaintiff to his brother, and he lent it to the partnerſhip, the Plaintiff cannot recover; or if *Joſeph Parkin* was agent to his brother, and he in that character lent the money, it cannot be recovered, becauſe *Joſeph Parkin*, the agent, had notice that *John Campbell* was not then a partner.

Garrow, *Park*, and *Scarlett* for the Plaintiff.
Erſkine, *Law*, and *Gibbs* for the Defendant.

SITTINGS AFTER TERM
IN THE COMMON PLEAS
AT WESTMINSTER.

Dec. 2.

The huſband is not liable for neceſſaries furniſhed to his wife, after a tradeſman had notice from the huſband that ſhe had a ſeparate maintenance; but it is incumbent on the huſband to ſhew that the tradeſman had ſuch notice.

RAWLYNS *v.* VANDYKE.

ASSUMPSIT for the lodging of the Defendant's wife and children; and for goods ſold and delivered to them.

The Plaintiff proved the lodging of the parties at his houſe, and the furniſhing of linen-drapery goods to the wife and children of the Defendant; which appeared to be neceſſaries for them.

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The defence was,—That the Defendant and his wife lived ſeparate: That he allowed her ten guineas a week: That the Plaintiff had notice of thoſe circumſtances, and not to truſt her: but the notice not to truſt her, was ſaid by the Plaintiff to have taken place after the bill for the goods had been delivered.

It was further contended, that there was no evidence that the huſband had refuſed to receive her. But it was given in evidence, that Mr. *Vandyke*, the Plaintiff, had ſupported a ſeparate eſtabliſhment for his wife at *Bath*, where he had viſited her once and at *Oſborn*'s hotel, in *London*; and paid the bills at both places.

Lord ELDON ſaid, The Defendant's counſel relies on his diſcharge from this action, firſt, On the ground of his living apart from his wife, and there being no evidence that he refuſed to receive her. My conception of the law is this: That if a man will not receive his wife into his houſe, he turns her out of doors; and if he does ſo, he ſends with her credit for her reaſonable expences. In this caſe Mr. *Vandyke* has lived apart from his wife, but he has paid her expences incurred in that ſituation in other places, and has therefore given her credit.

The ſecond ground taken by Mr. *Vandyke*'s counſel is, That he gave her a ſeparate maintenance; informed the tradeſman of that fact, and gave him notice not to truſt her. Separation, with a ſeparate maintenance, was formerly held ſufficient to charge the wife; but it is not ſo held now; the wife is not now liable; but it is a different thing to hold the wife not to be liable and the huſband to be liable: the

object of this action is to make the husband liable. If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged for goods furnished to his wife: and if a tradesman has notice of a separate maintenance given to the wife, it is the doctrine of Lord HOLT, that that shall be notice of an express dissent on the part of the husband, and he shall not be charged; but where the tradesman's demand is for necessaries, it is incumbent on the husband to shew that the tradesman knew of the separate maintenance.

The question therefore will be, Did Mr. *Vandyke* dissent from furnishing his wife with the things charged? I am of opinion, that for every thing furnished after notice of the separate maintenance, that that amounted to a dissent; and for those, that the Defendant is not liable.

If a husband, living in a state of separation from his wife, suffers his children to reside with their mother, he is liable for necessaries furnished to the children.

With respect to the things furnished to the children, I do not lay it down as the law, that where the children live away from the father, that he is liable, because the things furnished are necessaries; As a father, he has a right to the custody of his children, and may obtain possession of their persons by *habeas corpus*; but where he does not assert that right, and suffers them to remain with their mother, I think he thereby constitutes her as his agent, and authorizes her to contract those debts for clothing and other necessaries; but this I think should be left to the jury.

The jury found for the Plaintiff.

Cockell, Serjt. and *Parke* for the Plaintiff.

Best, Serjt. for the Defendant.

NORMAN

NORMAN *v.* COLE.

Dec. 7.

ASSUMPSIT for money had and received.

The action was brought to recover a ſum of 30*l.* which had been depoſited in the hands of the Defendant, under the following circumſtances:—

Aſſumpſit will not lie to recover back money depoſited for the purpoſe of being paid to a perſon for his intereſt in ſoliciting a pardon for a perſon under ſentence of death.

One *Tunſtall* being under ſentence of death in *Newgate*, the Plaintiff was prevailed upon to lodge that ſum in the hands of the Defendant, to be applied to the purpoſe of procuring him a pardon.

On the caſe being opened, Lord ELDON expreſſed a doubt, whether the action was maintainable, ſaying, that he would hold the Plaintiff to very ſtrict proof of the means uſed to procure the pardon; and called on the Plaintiff's counſel to ſhew upon what grounds they founded their right to recover.

They ſtated, that *Tunſtall* was a man of good character before his conviction: that one *Morland* being a perſon of good connections, and having acceſs to perſons of intereſt, the money was to be given to him for ſo uſing his intereſt, by repreſenting, in favourable terms, the caſe and character of *Tunſtall*.

Per Lord ELDON. I cannot ſuffer this cauſe to proceed. I am of opinion, this action is not maintainable: where a perſon interpoſes his intereſt and good offices to procure a pardon, it ought to be done gratuitouſly, and not for money: the doing an act of that deſcription, ſhould proceed from pure motives

motives, not from pecuniary ones. The money is not recoverable.

The Plaintiff was nonsuited.

Cockell, Serjt. and *Lawes* for the Plaintiff.

Best, Serjt. and *Reader* for the Defendant.

HILL, one, &c. *v.* HUMPHRYS.

An attorney's bill for business, must be left at his client's dwelling-house, if not personally delivered; a delivery at his compting-house is not sufficient within the stat. 2 *Geo.* II. c. 23.

THIS was an action of assumpsit, brought by the Plaintiff, who was an attorney, to recover the amount of his bill, for business done for the Defendant.

The Plaintiff proved the making out and delivery of his bill, and the business done; and that it had been left at the Defendant's house one month before the action brought; but it appeared that it had been left at the Defendant's compting-house.

It was objected by the Defendant's counsel: that this delivery was not conformable to the statute 2 *Geo.* II. chap. 23, which required a personal delivery, or the bill to be left at his dwelling, or last place of abode.

It was contended for the Defendant, that the compting-house was to be deemed a dwelling within the words of the statute, as the Defendant must have inhabited it while doing his business; and that the requisition of the statute was therefore satisfied.

Lord ELDON said, that he was of opinion that the true construction of the act required a delivery

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at the dwelling-houſe, if there was not a perſonal delivery; and that the delivery at the compting-houſe was therefore inſufficient; and nonſuited the Plaintiff.

Shepherd, Serjt. and *Barrow* for the Plaintiff.
Cockell, Serjt. for the Defendant.

SITTINGS AFTER TERM
IN THE COMMON PLEAS
AT GUILDHALL.

EWERS *v.* HUTTON.

A ſeparate maintenance ſecured by a deed executed by the huſband and wife, but not by her truſtee, is void; and ſuch a ſeparate maintenance is no anſwer to an action brought for neceſſaries furniſhed to her, after having left her own houſe, though ſhe ſolicited to be received again by her huſband.

THIS was an action of aſſumpſit, to recover a ſum of money for the maintenance and ſupport of the Defendant's wife.

It was proved, that the Defendant had treated his wife with much barbarity, and turned her out of doors: that the Plaintiff received her into his family, and furniſhed her with neceſſaries; for which the preſent action was brought.

There was alſo evidence given, that ſome time after the wife had been turned out, ſhe returned and rung at the bell: the Defendant went down to the door, and refuſed to admit her.

It was proved, that the wife had had between 3 and 400*l.* fortune when ſhe married.

The defence was,—That the abſence of the wife, for part of the time, was an elopement; as ſhe might

might have returned to her husband's house: 2dly, That a separate maintenance was secured to her, some time after her leaving her husband's house. To prove which, the Defendant gave in evidence a deed of separation, executed by the husband and wife; but it was not executed by the wife's trustee, who was a party to it.

Lord ELDON said, there was no doubt of the law, that where a husband, either from ill-treatment, compelled his wife to leave his house, from motives of personal safety, or turned her out of doors, that any person who afforded her protection, and furnished her with necessaries correspondent to his rank and situation in life, could compel the husband to pay for them; but that in ascertaining what suited his circumstances, the fortune which the wife brought could not enter into the consideration: the jury were to regulate their verdict by what the husband's circumstances were when the separation took place.

As to the question of elopement, it did not appear clearly, whether the term *elopement* in the books, meant an adulterous elopement or not: here there was no imputation of an adulterous elopement: but it was settled in a case in Lord *Raymond*'s Reports, to which he subscribed, that if the wife had eloped, and afterwards solicited to be received again, and the husband refused to receive her,—from that time he was bound for necessaries furnished to her; and that seemed to be the case, taking it even to have been a voluntary elopement by her.

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As to the deed of ſeparation produced, it was waſte paper,—it was binding in no degree; it was executed by the huſband and wife; but the wife had no will of her own; ſhe could execute no deed; ſhe could not covenant with her huſband; ſhe could only contract by the means of a truſtee, who became bound for the performance of what ſhe contracted to do: here he had not executed the deed. The huſband could not therefore be ſued; and the deed was of no avail.

His Lordſhip therefore concluded with obſerving, that the wife having ſolicited to be received into the Defendant's houſe, and being refuſed by him, he was bound to provide her with neceſſaries; and that the deed of ſeparation furniſhed him with no defence.

Verdict for the Plaintiff.

Shepherd, Serjt. and *Lawes* for the Plaintiff.

Beſt, Serjt. and *Barrow* for the Defendant.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

WOOLF *v.* CLAGGETT.

December 13.

ASSUMPSIT on a policy of aſſurance, on a *Daniſh* ſhip from *Altona* to *Surinam*.

When ſickneſs of the maſter or crew is ſet up as an excuſe for deviation, it is incumbent on the Plaintiff to ſhew that proper

The defence relied upon, was deviation. The ſhip, in the courſe of her voyage, had put into the port

medicines and neceſſaries for the voyage were on board, in a caſe where the nature of the voyage requires that there ſhould be a ſurgeon on board.

port of *Plymouth*, which was out of the common courſe of her voyage, where ſhe remained fourteen days.

The anſwer ſet up by the Plaintiff to this was, that after the ſhip had ſailed, the Captain was taken ill with a ſevere fit of the gravel: That the Mate having pricked his finger, by accident, his hand and arm ſwelled to ſuch a degree, as to render him incapable of doing his duty; and that they put into *Plymouth*, for the purpoſe of procuring medical aſſiſtance. The facts of the illneſs of the Captain and Mate,—of their going into *Plymouth*, and applying to a ſurgeon there, were proved; but it appeared on the croſs-examination of the witneſſes, that the ſurgeon of the ſhip was unprovided with the proper inſtruments and medicines. He was not called; but the ſurgeon at *Plymouth* proved that the medicines adminiſtered on board, were only common alterative pills, and that ſome lint had been uſed.

After the Defendant's counſel had addreſſed the jury for ſome time, Lord ELDON interpoſed.

His Lordſhip ſaid, that it appeared to him, that the Plaintiff had not made out his caſe. It was admitted that *Plymouth* was not in the regular courſe of the voyage inſured; but the Plaintiff juſtified the deviation from neceſſity. Neceſſity was in ſome caſes an excuſe for deviation; and he did not know that the excuſe ſet up here, had ever been admitted to be a ſufficient one. He was of opinion, that if by the viſitation of God ſo many of the crew, who were otherwiſe ſufficient, became ſo afflicted with ſickneſs,

ſickneſs, as to be incapable of navigating the ſhip, ſuch an illneſs of the crew was a neceſſity, which might juſtify a deviation; but when it was ſet up as a juſtification of a deviation, he thought it incumbent on the Plaintiff to ſhew that he had provided againſt what was ſo the act of God, by every proper precaution, as to medicines and neceſſaries for the voyage, as much as he was bound with reſpect to the tightneſs of the ſhip. It was in evidence, that a ſurgeon was neceſſary in ſuch voyages as the one inſured: if, therefore, ſickneſs was to be ſet up as an excuſe for deviation, the Plaintiff ſhould ſhew that the ſurgeon was provided with ſuch medicines and inſtruments as would probably become neceſſary in the courſe of the voyage, ariſing from he common caſualties of mankind. He thought, in the preſent caſe that had not been done: the ſurgeon at *Plymouth* was proved to have lanced the arm. Had the ſurgeon on board no lancet? The medicines too furniſhed by him, were of the moſt common kinds; and it was even proved, that though the captain was afflicted with the gravel, the ſhip's ſurgeon was unprovided with a ſyringe, though an inſtrument ſo neceſſary for that complaint. He was alſo of opinion, that the neceſſity for going into port ought to be made out by the Plaintiff beyond all poſſibility of doubt, and that it did ariſe and exiſt without any default of the maſter or party inſuring; and if they did come in for medical advice, he ſhould expect that medical men ſhould be called, to prove that ſuch neceſſity did exiſt.

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The ſurgeon at *Plymouth* had proved no ſuch thing; and his Lordſhip added, that he therefore thought the Plaintiff had failed in proving his juſtification for the deviation.

The Plaintiff was nonſuited.

Shepherd, Serjt. *Bailey*, Serjt. and *Lawes* for the Plaintiff.

Lens, Serjt. *Beſt*, Serjt. and *Onſlow*, Serjt. for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

HILARY TERM, 41 GEO. III.

IN THE KING'S BENCH,

FIRST SITTING IN TERM.

ESTE *v.* BROOMHEAD.

Jan. 28.

If to debt on the bond for securing an annuity, the grantor pleads that it is void for a defect in the memorial under the stat. 17 Geo. III. and the grantee submits to that plea and enters a *nisi prosequi*, the grantee may immediately maintain an action for money had and received.

ASSUMPSIT for money had and received.

The action was brought to recover the sum of 150*l.* which had been paid as the consideration of an annuity.

The Defendant's counsel objected: That the Plaintiff could not recover the consideration, as the annuity had not been set aside.

To this it was answered, That admitting it to be necessary for the grantor of the annuity to set it aside before the grantee could sue in this action; in this case he had done what was tantamount to it; for the grantee, the present Plaintiff, had brought an action on the bond given for securing the annuity, which was the sum which had been paid for it: that to that action on the bond, the Defendant had pleaded that the bond was void, by reason of a defect in the memorial,

under the annuity act of 17 *Geo.* III.: That the Plaintiff, knowing the plea to be true, had entered a *noli proſequi*; ſo that the Defendant had relied on its being void; had had the benefit of his plea to that effect; and that he ſhould not now be allowed to conſider it valid and ſubſiſting.

His Lordſhip acquieſced in the diſtinction, and the Plaintiff recovered.

Garrow, *Onſlow*, Serjt. and *Beauclerk* for the Plaintiff.

Erſkine and *Dampier* for the Defendant.

Vide *Weddell* v. *Lynam*, ante 1ſt vol. 309.

SECOND SITTING IN TERM.

REX *v.* LAWSON and others.

Under the general authority given by the appointment of conſtables and ſurveyors to the Shadwell police-office, they cannot take a perſon into cuſtody without a ſpecial warrant.

THIS was an indictment againſt the Defendants; The firſt count was for an aſſault on the proſecutor, charging him as a conſtable belonging to the *Thames* police-office; the ſecond, for a common aſſault.

By the ſtat. 39 and 40 *Geo.* III. ch. 87, the Police-office was eſtabliſhed at *Shadwell:* by that act, juſtices are appointed to that office, and a power is given to them to appoint perſons as conſtables and ſurveyors. One of the proſecutors was appointed a conſtable, and another perſon of the name of *Cowen*, ſurveyor. The Defendants were the mate and part of the crew belonging to the ſhip *Cygnet*, then lying in the *Thames*.

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In conſequence of an information, the conſtable and *Cowen* the ſurveyor went on board the ſhip, and found a conſiderable quantity of coffee and ſugar, which they ſeized: they departed, but deſired the Defendants to attend at the police-office the next day. The Defendants neglected to do ſo; in conſequence of which, the conſtable and *Cowen* went on board the day following, when the Defendants refuſed to attend. The conſtable endeavoured to ſeize *Lawſon* the Defendant; when a ſcuffle enſued, and the officers where driven from the ſhip. For this aſſault the preſent indictment was preferred.

In the courſe of the evidence of *Cowen*, it appeared that the Defendant *Lawſon*, when the officer came on board, aſked for his authority: he produced a parchment, which was his appointment to the place of ſurveyor, in which was mentioned the ſeveral parts of his duty. The parchment was produced. Lord KENYON aſked, If they had any warrant or other authority to take the Defendants into cuſtody?

Being anſwered in the negative, his Lordſhip proceeded:—I think there muſt be an acquittal. After firſt finding the goods, the Defendants were ſuffered to go at large; the juſtices ſhould have iſſued their warrant, grounded on an information, authorizing the officers to take the Defendants into cuſtody, and bring them before the magiſtrates: that has not been done. The ſurveyor and conſtable went on board without any authority, except that derived from the appointment of the former, which is in the nature of a general warrant. I do not approve of general warrants; they have been repro-

bated a century ago. I think the profecutor had no authority to take the Defendants into cuſtody; and they muſt be acquitted.

Garrow, the Common Serjt. *Silveſter*, *'Eſpinaſſe*, and *Knapp* for the Plaintiff.

Erſkine and *Gurney* for the Defendants.

SITTINGS AFTER TERM AT WESTMINSTER.

Feb. 14, 1801.

EDMONSTONE *v.* WEBB.

If a bankrupt pleads his bankruptcy in bar, and the Plaintiff relies on its having been obtained by fraud, by allowing perſons to prove debts who were not bonafide creditors, ſuch perſons are witneſſes to prove the fraud, and ſhould be called.

THIS was a *ſcire facias* on a judgment.

The Defendant pleaded his bankruptcy; and relied on his certificate, that the cauſe of action accrued prior to it.

The Plaintiff impeached the certificate, on the ground of fraud.

The fraud relied on was,—That perſons had been admitted to prove debts under the Defendant's commiſſion, and to ſign his certificate, who, in fact, were not creditors, but who ſwore to fictitious debts, in order to entitle them to ſign it. That by ſtat. 24 *Geo.* II. chap. 57. ſect. 9, it is enacted, "That where any perſon ſhall fraudulently ſwear or depoſe before the major part of the commiſſioners named in any commiſſion of bankruptcy, or by affidavit or affirmation exhibited to them, that a ſum of money is due to him or her from any bankrupt or bankrupts, which ſhall, in fact, be not really, and, in fact, ſo due and owing; and ſhall, in reſpect of ſuch fictitious or pretended debt, ſign his or her

her conſent to the certificate for ſuch bankrupt's diſcharge from his debts,—in every ſuch caſe, unleſs ſuch bankrupt ſhall, before ſuch time as the major part of the ſaid commiſſioners ſhall have ſigned ſuch certificate by writing, by him to be ſigned and delivered to one or more of the ſaid commiſſioners, or to one or more of the aſſignees of his eſtates and effects under ſuch commiſſions diſcloſe the ſaid fraud, and object to the reality of ſuch debt; ſuch certificate ſhall be null and void to all intents and purpoſes, and ſuch bankrupt ſhall not, in that caſe, be entitled to be diſcharged from his debts, or to have or receive any of the benefits or allowances given or allowed to bankrupts by the ſaid act of the fifth year of his Majeſty's reign; any thing therein contained to the contrary thereof in anywiſe notwithſtanding."

The Plaintiff's counſel then propoſed to prove, by collateral evidence, That ſeveral of the debts were fraudulent; particularly in the caſe of one *Henley*, who had proved a debt under the commiſſion. His debt they propoſed to impeach, by ſhewing that he had himſelf become inſolvent, and aſſigned his effects to a truſtee; that by ſuch means they had become poſſeſſed of his books; by reference to which it would appear that *Webb* the bankrupt did not owe to *Henley* the debt which he had proved under the commiſſion.

They alſo offered, by ſimilar evidence, to impeach the debts of others.

The Defendant's counſel objected: That this was attempting to do by indirect, what could be done by direct evidence; that was, by calling the

parties themſelves who had proved their debts, and by examining them as to the actual ſtate of their accounts when the debts were proved.

It was anſwered by the Plaintiff's counſel, That it would be improper to call ſuch witneſſes, who muſt be perjured on one ſide or other; inaſmuch as if they came forward as witneſſes on the trial, to prove, that at the time when they ſwore to the debt under his commiſſion, *Webb* was not indebted to them, they would be entitled to no credit.

Lord KENYON ſaid, That that objection ſhould lie in the mouth of the Defendant, not of the Plaintiff; and he thought they ought to be called; their teſtimony being certainly open to much obſervation.

One witneſs of that deſcription was called, who eſtabliſhed the fact of fraud; and the Plaintiff had a verdict.

Gibbs and *Lawes* for the Plaintiff.

Garrow for the Defendant.

Feb. 17.

Where a note is given to a married woman, to pay a debt contracted by her in the way of a ſeparate trade carried on by her, and ſhe indorſes it, the indorſee cannot recover: the Plaintiff ſhould declare on it as a note payable to the huſband; and her indorſement might be good on, proving that he allowed her to do ſo in the way of her trade,

BARLOW *v.* BISHOP.

ASSUMPSIT by the Plaintiff, as indorſee of a promiſſory note, made by the Defendant, payable to *Ann Parry*, and by her indorſed to the Plaintiff, with the common money-counts.

Plea of *Non-aſſumpſit*,

The defence was,—That the Plaintiff made title through *Ann Parry*, who was a married woman; and who for that reaſon could not indorſe the note: that when the note was given, it at that moment became

became the property of the husband; so that by no act of the wife could that property be transferred from him to another.

Lord KENYON said, on this objection being taken, That the Plaintiff should have declared on the note according to its legal effect; that is, as a note payable to the husband; and if it appeared that the husband had allowed the wife to indorse bills and notes on his account, the Plaintiff might then have relied on the indorsement by the wife.

The Plaintiff proved, That the wife carried on the business of a milliner, at *Birmingham*; and the consideration of the note was haberdashery goods, furnished by the Plaintiff, who was an haberdasher in *London*: That she had dealt with the Plaintiff in her own name: That she had given a note for the money in her own name: That the present note was given by the Defendant, on being informed that the former note could not be negociated with full knowledge of all the circumstances; and cited *Israel* v. *Douglas* 2 *H. Black.* 239.

Lord KENYON said, He was afraid the Plaintiff could not recover on the note, on account of the indorsement; but that he would reserve the point, Whether he could not recover on some of the money-counts?

Erskine and *Espinasse* for the Plaintiff.

Gibbs for the Defendant.

In the next Term this was moved; when the court were of opinion, that the Plaintiff could not recover.

WELDON *v.* GOULD.

Callico-printers have a lien for a general balance on goods delivered to them to print.

TROVER for a quantity of callicoes.

Plea of Not Guilty.

The caſe was,—That the Plaintiff had delivered the callicoes to one *Pearce*, to have them printed; he delivered them to the Defendant, who was a callico-printer: the Defendant did not know that the goods did not belong to *Pearce*; and he kept the goods for the balance of a general account between *Pearce* and him.

The Plaintiff's counſel contended, 1ſt, That the Defendant had no right to hold the goods for the general balance; and, 2dly, That even ſo, the Defendant could not hold the goods, as they were not the property of *Pearce*; and that the lien, if any, could extend only to caſes of the goods of the party himſelf.

Lord KENYON ſaid, That he thought the Plaintiff had a lien for a general balance; and that the ſame point had been before decided, that callico-printers had ſuch a lien; but that it muſt be for work done in the courſe of that buſineſs, for which the lien was claimed;—they could not claim a lien for money lent, or for any collateral matter: it ſhould be confined to work done in the particular buſineſs. As to the ſecond point, he was of opinion, That if the goods were taken in by the Defendant as the goods of *Pearce*, who was his debtor, and ignorant that the property belonged to another, he thought the lien extended to thoſe goods, and gave the Defendant a right to hold them. It was like the caſe of a factor, where, if the perſon who deals

Where callico goods are delivered to a perſon to have them printed, and ſuch delivers them to a callico-printer for that purpoſe, to whom he is then indebted; the callico-printer may hold theſe goods againſt the owner, by virtue of his lien.

deals with a factor, receives goods from him as his own, he has a right to hold them for a debt due by the factor, and againſt the rightful owner; and cited *George* v. *Claggett*, 7 Term Rep. 359.

It would therefore be neceſſary for the Defendant to ſhew, that there was ſuch a balance due to the Defendant, as entitled him to hold the goods as a lien. The Defendant did give that evidence, and had a verdict.

Garrow and *Marryat* for the Plaintiff.

Erskine and *Wood* for the Defendant.

LIMLAND v. STEPHENS.

CASE for ſeaman's wages.

Plea of *Non-aſſumpſit*.

If a maſter of a ſhip by inhuman treatment compels a ſailor to quit a ſhip, it is not ſuch a deſertion as ſhall amount to a forfeiture of his claim for his wages for the voyage performed.

The Plaintiff and Defendant were natives of *Sweden*. The Plaintiff had entered on board the ſhip at *Stockholm*. The articles were out and home. She had made a circuitous voyage, and arrived in the *Thames* in *December*, 1800. The Defendant had aſſaulted and beat the Plaintiff ſeveral times in the courſe of the voyage; and had put him before the maſt, as a common ſailor, though he had been hired in the capacity of mate. The Plaintiff applied to the *Swediſh* conſul, ſtating his ſituation, but nothing was done; the conſul only deſiring the Defendant to attend him; which he refuſed to do.

The defence relied on was,—That the Plaintiff being a ſailor, had hired with the Defendant, under articles; by which the Defendant was bound, under a penalty, to bring back his crew to *Sweden*; ſo that

that no action could be maintained in *England*, or until the completion of the voyage.

Lord KENYON. There are reciprocal duties between masters and servants. From the servant, is due obedience and respect; from the master, protection and good treatment. Desertion is a forfeiture of wages; but if the captain conducts himself in such a way as puts the sailor into that situation, that he cannot without damage to his personal safety continue in his service, human nature speaks the language,—a servant is justified in providing for that safety. After the Plaintiff had been with the consul, he communicated to the Defendant the wish of the consul to see him. The captain said, "He would go when it suited him;" and being pressed by the Plaintiff to do so, he beat the Plaintiff very severely; threw a log of wood, which hurt his foot. The Plaintiff left the ship; and the Defendant was heard to say, That if he returned, he would chain him to the mast, and bring him to *Sweden*.

Erskine. The Plaintiff cannot justify a desertion by reason of the Defendant having beat him; for that, he could have an action of assault, which is a proper remedy. In this case the Plaintiff sailed under articles, by which the captain is bound to bring back his crew to *Sweden*, under a penalty; and the sailor forfeits his wages by desertion.

Lord KENYON. Is a man bound to serve at the peril of his life? Desertion is an answer to the seaman's claim for wages; but that must be a voluntary act of the seaman's, and not be caused by any act

act of the captain. In this case, the act of the captain has made the dissolution of the contract necessary and, in my opinion, justifiable on the part of the sailor; and, I think, he is entitled to a verdict.

Verdict for the Plaintiff.

Garrow and *'Espinasse* for the Plaintiff.

Erskine and *Wigley* for the Defendant.

MESNARD *v.* ALDRIDGE.

Feb. 21.

THIS was an action on the case, on the warranty of an horse.

The conditions of the sale by auction, printed and pasted up under the auctioneer's box, where he declares that the conditions are as usual, is sufficient notice to purchasers of the conditions.

The horse was sold by the Defendant, by auction, at his repository, and warranted sound.

The sale took place on the *Wednesday*. At the time of the sale, the auctioneer announced that the conditions of the sale were as usual.

These conditions of sale were proved to be contained in a printed paper, pasted up under the auctioneer's box; and by one of them, all horses purchased there, in case of any unsoundness discovered, are required to be returned before the evening of the second day after the sale.

The horse in question was not returned till the *Saturday*. When returned by the Plaintiff, he was informed that it was too late, as he ought, pursuant to the conditions of the sale, to be returned on the evening of *Friday*.

Erskine, for the plaintiff, contended, That there was no evidence of notice of the conditions of the sale,

ſale, ſufficient to bind him. That the auctioneer had not proclaimed them publicly; ſo that the Plaintiff might have been ignorant that he purchaſed under ſuch conditions. But, at all events, he contended, That if the Defendant, who was not the owner of the horſe, had not paid over the price (which if he had, he admitted he would not have been liable) that he remained ſubject to this action, on the warranty.

Lord KENYON. In this caſe it is proved, that printed particulars of the ſale are paſted up in the public ſale-room, under the auctioneer's box. In the caſe of carriers, who advertiſe that they will not be liable for goods loſt above the value of 5 *l.* unleſs entered as ſuch, the poſting up of a bill in the coach-office to that effect, has been held to be ſufficient. I therefore think the ſame mode being adopted here, gives the ſame degree of notice to all perſons who come to this ſale; and that it is a ſufficient notice of the conditions under which the horſes are ſold.

With reſpect to the main point, When parties enter into a ſpecial agreement, they muſt adhere to the terms of it. Here there is a condition, That the party purchaſing, muſt return the horſe within two days; which he has not done. I therefore think the Plaintiff muſt be nonſuited.

Erskine, *Garrow*, and *Reader* for the Plaintiff.

Law and *Gibbs* for the Defendant.

CARY

CARY *v.* LONGMAN.

If an author makes very considerable additions to a work before printed, he obtains a copy-right in the additions and can maintain an action for an infringement of it.

THIS was an action on the caſe, brought to recover damages for infringing the copy-right of a book called *Paterſon's Itinerary, or Book of Roads*, belonging to the Plaintiff.

The Defendant had been the proprietor of an *Itinerary, or Road Book*, called *Paterſon's*. In the contract for the mail-coaches, many diſputes having ariſen concerning the actual diſtances of places in *England* and *Wales*,—in the year 1793, a Mr. *Haſcar*, who was then ſuperintendant of the mail-coaches, engaged with the Plaintiff to make an actual ſurvey of the roads, by the direction of Lord *Walſingham*, who was then one of the poſtmaſters general. The agreement under which the Plaintiff engaged was, to be paid 9 *d. per* mile, with every aſſiſtance which he could have from the poſt-office and poſt-maſters all over the kingdom; and he was to be entitled to all the benefit to be derived from the ſale of the book.

Paterſon's Book of Roads was firſt publiſhed in 1771. It went through many editions; and in 1796, the eleventh edition was publiſhed. In 1798, *Cary* the Plaintiff, publiſhed his Itinerary from his ſurvey; and though there were in it ſeveral very great improvements, he had borrowed a great deal from *Paterſon*. In 1799 the twelfth edition of *Paterſon*'s was publiſhed, by the aſſignee of the Defendant on the record (they having ſold to a Mr. *Newbery*); and this edition contained in it all the improvements that

Cary

Cary the Plaintiff procured from his ſurvey, as well as others of their own.

The counſel for the Plaintiff, contended, That the Defendant, by embodying into his twelfth edition the improvements and matter of the Plaintiff's, had been guilty of a piracy of his work, and a breach of his copy-right.

For the Defendant, it was, on the contrary, contended, That *Cary*'s Itinerary was, in fact, but a new edition of *Paterſon*'s Road Book, with improvements; or, at all events, that his publication was a piracy itſelf. That ſince the ſtatute of *Ann*, the rights of authors to copy-rights, reſted only under the ſtatute; and no common law-right exiſted: That the Plaintiff could therefore only derive his title under the ſtatute of *Ann*; and that under that act, it was neceſſary that the Plaintiff, who complained of the infringement of his right, ſhould be the author; which they contended here he was not.

To ſhow that, in fact, *Cary* had embodied *Paterſon*'s book in his own, ſeveral errors which were in *Paterſon*'s book, were found to be copied into *Cary*'s: and the ſame evidence was given on the part of *Cary*, to prove that his improvements had been copied into the twelfth edition of *Paterſon*.

Per Lord KENYON. It appears in this caſe, that the Plaintiff Mr. *Cary*, has been employed by thoſe concerned in the management of the poſt-office, to make an actual ſurvey of the roads; which has been actually made at a conſiderable expence. The public has paid that money, if I may uſe the expreſſion, to acquire that copy-right in the ſurvey which

which was to be made at their expence. But it is ſaid, That the whole of the book publiſhed by the Plaintiff, is not his own: that he has pirated from the Defendant's book: but ſtill it is clear, that a very conſiderable part is of his own collecting. It is not neceſſary that a Plaintiff who brings an action of this ſort, ſhould have the whole property in the work which he publiſhes. When the learned Dr. *Samuel Clarke* publiſhed an edition of *Homer*, with notes, did any one doubt of his copy-right of the notes he had publiſhed? Or of that fund of learning, Dr. *Bentley*'s right to his notes on *Horace?*

Mr. *Gray* gave part of his works to the public, as they were publiſhed by Mr. *Murray*, the bookſeller; but ſome of Mr. *Gray*'s poſthumous works being publiſhed by Mr. *Maſon*, which Mr. *Murray* added to his publication, the court ordered Mr. *Murray* to expunge the latter from his publication.

In this caſe Lord *Walſingham*, by whoſe direction the ſurvey was made, has given the copy-right of that part of the work ariſing from Mr. *Cary*'s ſurvey, to him; and as it has been uſed by the Defendant's aſſignee, in his laſt publication of *Paterſon's Road Book*, without his conſent, I think the copy-right has been infringed; but, under all the circumſtances, nominal damages will perhaps ſatisfy the juſtice of the caſe.

The jury found a verdict for the Plaintiff, with damages 1 *s.*

Erſkine, *Mingay*, and *Holroyd* for the Plaintiff.

Gibbs, *Park*, and *Wigley* for the Defendant.

HOARE

HOARE v. ALLEN.

In an action for crim. con. when connivance to her elopement is imputed to the huſband, he may call a witneſs to prove the repreſentation made by the wife to her huſband of the place to which ſhe was going previous to her elopement.

THIS was an action for criminal converſation with the Plaintiff's wife.

This cauſe had been tried before. It then appeared that the Plaintiff, by a letter from the Defendant, with whom he had lived in habits of great intimacy, was informed, that his wife had conceived for him an affection, which he had endeavoured to avoid: diſavowing that any thing criminal had then taken place; but adding, that in caſe ſhe did quit her huſband's houſe, he would think himſelf bound, in honour, to afford her an aſylum. It appeared in evidence, that after the receipt of this letter, her huſband had permitted her to go from his houſe, under the pretence of going to her uncle's, accompanied only by a ſingle ſervant.

The counſel for the Defendant relied on this as a connivance on the part of the huſband (the Plaintiff) to her elopement; and which went to the ground of the action. At the former trial the jury thought ſo, and found a verdict for the Defendant.

The caſe now came on to be tried on a new trial. The Plaintiff's counſel relied, That the wife had left his houſe with a declaration of her intention to go to her uncle's: that the huſband had ſuffered her to go, under the impreſſion that that was the object of her journey.

The Plaintiff called a Mr. *Clark*, an intimate friend of his; he proved, That he had been ſent for by Mr. *Hoare*; he communicated to him the letters which

which the Defendant had written to him. He ſtated, that the Plaintiff was in great diſtreſs and anxiety of mind.

He was aſked, If Mrs. *Hoare* did not inform her huſband that ſhe was going to her uncle's; and that her huſband had given credit to it? And the Plaintiff's counſel were proceeding to examine further to that effect.

This was objected to by the Defendant's counſel.

Erskine contended, That though it was not evidence on the iſſue, to ſhew that her real intention was to go there; yet, that it was evidence that the huſband really believed that her intention was to go where ſhe repreſented.

Lord KENYON ſaid, That he had doubts in his mind reſpecting the propriety of thoſe queſtions, of the repreſentations made by the wife to the huſband, reſpecting her views and intentions as to a fact which afterwards took place. As, however, ſome of the Judges, on a motion for a new trial, thought that this was part of the *res geſta*, and ought to be admitted, he ſhould admit it; to which the Defendant's counſel, if they thought fit, might tender a bill of exceptions.

There was a verdict for the Defendant.

Erskine, *Dallas*, and *Newbolt* for the Plaintiff.

The *Attorney General* and *Garrow* for the Defendant.

HARMAN *v.* TAPPENDEN and others.

A party who has been amoved from being a member of a corporation, and who has been reſtored by mandamus, cannot maintain an action for damages againſt the members of the corporation who amoved him by an act done in their corporate capacity, nor recover the coſts of the mandamus.

THIS action was brought by the Plaintiff, who was one of the freemen of the company of free fiſhermen and dredgermen of the manor and hundred of *Feverſham*, in *Kent*, who had been removed from his ſaid office, and was reſtored to it by a mandamus from the court of King's Bench.

The Plaintiff declared for ſpecial damages, by reaſon of his amotion: firſt, That he for a long time (to wit, from the 4th of *Auguſt*, 1798, to the 18th of *January*, 1800) was deprived of the advantages, profits, &c. to be derived from his privilege of laying and keeping oyſters on the oyſter grounds; and, 2dly, Was put to great coſts and charges in the ſeveral proceedings in the court of King's Bench, in procuring his reſtoration to the ſaid office.

The Defendants on the record were the ſteward, foreman, treaſurer, and book-keeper of the company, and the other members who conſtituted a court, called *The Water Court*; by the ſentence of which the Plaintiff had been amoved.

The Plaintiff proved, That he was entitled, as one of the corporation of free fiſhermen, to certain profits from the oyſters, and which he had loſt in conſequence of his amotion. He then proved the amotion by the act of the corporation; and laſtly, The coſts which he had incurred in his application to the court of King's Bench, and the proceedings on the mandamus.

Upon

Upon this caſe being made out, ſeveral objections were made to the action; but the only two upon which the Lord Chief Juſtice gave any opinion, were the following:—

It was firſt objected, That the action was not maintainable againſt the Defendants; inaſmuch as it appeared that the acts upon which the action was founded, had been done by them in their corporate capacity: 2dly, That the declaration went to recover the coſts of the mandamus, which could not be recovered by law, as the court of King's Bench had not given them when the rule was made abſolute for a mandamus.

Lord KENYON ſaid, That with regard to the latter point, he had no doubt: That the law had given coſts only in one caſe of a mandamus, that was under the ſtatute 9 *Ann*, chap. 20. which gave coſts where there was a traverſe; that he ſhould therefore hold, That the Plaintiff could not recover any in this action.

That with reſpect to the firſt point, he was diſpoſed to be of opinion, that the action could not be ſuſtained on the ground made by the Defendants counſel: That the Defendants were charged for an act done in their corporate capacity. Nothing was charged or proved againſt the Defendants that the act had proceeded from malice, or that it was done by the individuals, with a view to deprive him of the profits which he derived from his ſituation in the corporation, which alone could afford any colour to the action. He, however, would reſerve this point, and ſuffer the Plaintiff to take a

verdict, with leave for the Defendants to move to ſet it aſide, and have a nonſuit entered.

Erſkine, *Garrow*, *Gibbs*, and *Wood* for the Plaintiff.

Law, *Mingay*, *Bayley*, Serjt. and *'Eſpinaſſe* for the Defendants.

1 Eaſt. Rep. In the next term, a rule was obtained to the above effect, when the court argued in opinion with the Lord Chief Juſtice, and a nonſuit was entered.

SITTINGS AFTER TERM AT GUILDHALL.

1801. *February 24th.*

COORE *v.* KENEDAY.

In an action of debt on a judgment of the Court of Conſcience of London, the Plaintiff muſt prove that the Defendant when the judgment was obtained, was reſident within its juriſdiction.

DEBT on a judgment of the Court of Conſcience for the city of *London*.

The declaration ſtated the acts of parliament for eſtabliſhing the courts of Conſcience in *London*, for the recovery of ſmall debts. It then averred, That the Plaintiff, being a perſon inhabiting within the city of *London*, duly warned and ſummoned the Defendant (he then being a perſon inhabiting within the ſaid city) to appear before the commiſſioners for the court of Requeſts: that ſuch proceedings were had: that the commiſſioners made an order between the ſaid parties, ordering that the ſaid Defendant ſhould pay into the ſaid court of Requeſts, at *Guildhall*, for the uſe of the Plaintiff,

4cr.

40 *s.* and 10 *d.* for coſts, at four weekly payments, until the Defendant and coſts were ſatisfied, and which order then remained in full force and effect; that the Plaintiff had not in any way been ſatisfied in that demand.

Plea, General iſſue.

The Plaintiff proved the entry in the book of the commiſſioners of the court of Requeſt; by which it appeared, That the judgment ſtated in the declaration had been given.

The Defendant's counſel inſiſted, That it ſhould be proved that the Defendant was at the time of the judgment reſident within the juriſdiction of the court of Conſcience in *London*.

Lord KENYON ruled it to be neceſſary: and the Plaintiff being unable to prove it, was non-ſuited.

Erſkine and ——— for the Plaintiff.

Mingay and *Barrow* for the Defendant.

ALLEN *v.* KEEVES.

ASSUMPSIT on a banker's check, drawn by the Defendant on *Bowles* and Co., who were bankers, payable to *Janer* or bearer for 20*l.*, dated the 28th *November*, 1801.

A draft on a banker cannot be poſt dated, though not intended to be uſed until the day when it actually bears date.

The Plaintiff proved the hand-writing of the parties; that the bill was preſented to the bankers for payment, who refuſed payment; and notice to

Keeves, the defendant; and there reſted their caſe. It was proved that the check was given to the Plaintiff on the 14th of *November*; but it was dated the 18th, on which day it was preſented as above ſtated, it being ſtated that it was not to be uſed till that time.

Gibbs objected: That the Plaintiff could not recover: that it was in effect a bill of exchange, payable four days after date, it being made the 14th of *November*, and made payable the 18th, four days after, which was done to avoid the ſtamp. That by the 4th ſection of the ſtatute 37 *Geo.* III. ch. 90. drafts or orders payable to bearer on demand, bearing date on or before the day on which they were iſſued, are exempted from the ſtamp-duty: that this did not come within the exception of the ſtatute, and therefore could not be given in evidence.

Lord KENYON ſaid, he was of opinion that, as the draft was intended only to have effect and operation from the 18th, when it was dated, he ſhould hold it to be a draft of that date; and it appeared to him that it would produce great inconvenience in the commercial world, if he was to hold, That a check on a banker could not be poſt dated.

Verdict for the Plaintiff for the amount, with liberty to the Defendant to move to enter a nonſuit.

Law and *Warren* for the Plaintiff.

Gibbs and ——— for the Defendant.

In the next term *Gibbs* moved for a new trial; when Lord KENYON changed his opinion, and held

the

the caſe to be not within the exception of the ſtatute; and the Plaintiff was nonſuited.

THELLUSON *v.* COPPINGER.

1801. *February 27th.*]

THIS was an action of malicious proſecution.

The Defendant had preferred a bill of indictment againſt the Plaintiff, upon which he had been acquitted.

The Defendant was in the King's Bench priſon for debt.

He now applied to Lord KENYON ſitting at *Niſi Prius*, that he might be brought up to attend the trial of this cauſe. The affidavit ſtated, That the cauſe was of much conſequence to him; and that he believed his preſence would be of material conſequence at the trial.

Lord KENYON ſaid, it could not be done. He remembered the firſt caſe in which the queſtion had ariſen reſpecting bringing up a perſon charged in execution, and which had given riſe to one of the hardeſt actions ever tried: it was againſt the ſheriff for an eſcape of the perſon brought up under ſuch circumſtances. The law was however now well ſettled, that a witneſs might be brought up; but it had never been extended to the caſe of a party to an action; nor could he do it.

Mackintoſh for the Defendant,

IN THE COMMON PLEAS.
SITTINGS AFTER TERM AT GUILDHALL.

Doe ex dem. WALKER v. STEPHENSON.

February 27th.

Where a will is conteſted between the heir at law and a ſtranger, the execution of it muſt be proved by the moſt clear and unequivocal evidence: but, if conteſted at the end of ſome years, when the ſubſcribing witneſſes are dead, evidence may be called to their character.

EJECTMENT for premiſſes in *Fenchurch Street*.

The leſſor of the Plaintiff was the heir at law of *Mary Robinſon*, the teſtatrix.

The Defendant claimed as deviſee, and was not related to the teſtatrix: the will, it was conteſted on the ground of fraud in procuring it, was dated in 1785: two of the ſubſcribing witneſſes were dead: the third was called: he proved, That the teſtatrix lived at *Rumford*, in *Eſſex*: that he, the witneſs, together with an attorney and his clerk, who were the two other witneſſes, went down in the evening to *Rumford*; he ſtayed for ſome time, and between eleven and twelve o'clock at night, the witneſs was called in, the attorney and his clerk having been in the room ſome time before, when he ſigned the will; but he ſaid that he never heard the teſtatrix ſpeak; and that ſhe held down her head, and looked heavy and ſtupid.

Lord ELDON to the Defendant's counſel. Do you recollect the caſe of *Doe ex dem. Parr* v. *Hicks*, at *Wincheſter*? Mr. Juſtice BULLER laid it down, That when a ſtranger to the family claim

claims under a deviſe, he would expect it to be done by moſt clear and explicit evidence. As to the execution of the will, I ſubſcribe fully to that of Mr. Juſtice BULLER's doctrine: the witneſs to a will is to ſpeak to a fact, that the teſtatrix was at the time of executing the will of ſound diſpoſing mind, memory, and underſtanding. Can a witneſs who never heard her ſpeak pronounce on that? And is it not evidence againſt her ſanity that ſhe appeared in a ſtupid and incapable ſtate? I think it is.

The counſel for the Defendant relied, That as the will was conteſted at the end of fifteen years, when two of the ſubſcribing witneſſes were dead, they ſhould be at liberty to prove that the witneſſes were perſons of character, and not likely to procure ſuch a will as was imputed to have been impoſed on the teſtatrix. This was oppoſed by the Plaintiff's counſel.

Lord ELDON ſaid, he ſhould admit it; and the evidence was admitted to that effect.

The ſurviving witneſs, who was called, ſtated, That before he went to *Rumford*, the mother of the Defendant, who was a legatee, called to inform him, he was to go there. He ſaid, "That he muſt ſtop to get a clean ſhirt." She replied, "Never mind, it will be better than a ſhirt to you." He was proceeding to ſtate that, after he returned, he was called in by her; and the circumſtance of a converſation reſpecting the executing of the will.

This was objected to.

Lord ELDON held, That as ſhe had directed the witneſs to prepare to go to *Rumford*, for the purpoſe

of

of attesting the will, any conversation with her respecting the will, was evidence.

Verdict for the Plaintiff.

Shepherd, Serjt. *Best*, Serjt. and *Jervis* for the Plaintiff.

Vaughan, Serjt. *Lens*, Serjt. and *Warren* for the Defendant.

WOODWARD v. LARKING.

In an action of trespass against the sheriff, it is sufficient evidence to shew a bill of sale executed by him of the property in question, which recites the writ, the taking, and the sale of the property by him under it.

TRESPASS for taking a ship.

Plea of Not guilty.

The Plaintiff, to prove the taking by the Defendant, who was sheriff of *Kent*, produced a bill of sale of the ship, &c. executed by the Defendant to a purchaser under the *fi. fa.* It recited the issuing of the writ in a cause of *Barrow* v. *M'Connell*; that he had seized it under the writ, and so sold and transferred it. This was relied on as proof of the trespass.

For the Defendant it was objected: That the only way to make the sheriff a trespasser, was by production of the writ, and proof of the taking by his officer.

Lord ELDON ruled, That as the circumstances were stated in the bill of sale, he thought that was the evidence of the trespass.

To prove property in the Plaintiff, his counsel produced a copy of the ship's register from the Custom-house, in which the Plaintiff's name appeared as owner.

The Defendant relied, That by Lord *Liverpool*'s act, the mere act of production of the register

giſter was not of itſelf evidence of the property, without the production of the bill of ſale.

Lord ELDON. The regiſter ſtates, That ſhe was a *Britiſh* built ſhip, captured by the enemy; that the regiſter was deſtroyed; that ſhe was ſold to a neutral ſubject; was then become the property of a *Britiſh* ſubject, and regiſtered then as the ſole property of *Woodward* and *Tarras*. Under theſe circumſtances there is no bill of ſale neceſſary; it is purchaſed from a foreigner, and now, for the firſt time, became *Britiſh* property: this, therefore, is as if the party who makes the regiſter is the builder; and is, I think, evidence of property ſufficient to call on the Defendant to explain in it.

If a ſhip's regiſter taken from the cuſtom-houſe, recites that ſhe was a veſſel captured by the enemy, ſold to a neutral ſubject, and by him to a Britiſh ſubject, it is *prima facie* evidence of property.

The defence was, That *M'Connell* was the real owner, and *Woodward* the captain: that *M'Connell* was poſſeſſed of the grand bill of ſale, by a purchaſe under a condemnation at *Bulloigne*; and that he had paid for the repairs, &c. and appointed *Woodward* as his captain. To prove this, the Defendant produced a *French* bill of ſale of the ſhip, by which it was aſſigned to *M'Connell*. This was proved to be done by a notarial act, under ſeal, which was produced, and a copy of the original act.

This was objected to as not being evidence, it not being an examined copy, nor proved to be ſubſcribed by the parties. It was proved, in anſwer, That the uſage was to lodge the original inſtrument with the officer; and that the notary made out a copy, which he delivered out, and which was the inſtrument produced.

Lord

To prove the transfer of a ship by a French bill of Sale, verified by a notarial act, and a copy of the original act, is evidence.

Lord ELDON said, It was sufficient evidence, the original being always retained, and a copy only issued by a person having power by the law of *France* to authenticate the instrument.

It appeared that it had been proposed to sell a part to *Woodward*; and he stated, That 600 *l.* was paid on that account; which the Defendant admitted.

Lord ELDON. An equitable title will not be sufficient to establish a property to maintain this action. I take it to be clear law, that his Majesty's subjects cannot buy ships captured; it is founded in his allegiance not to aid his enemy: it is to aid the enemy to buy captured property: notwithstanding the *French* condemnation, a person of this country cannot purchase such property, which belonged to a fellow-subject: the property therefore still remains in the original owner, from whom it was captured.

To maintain trespass for taking a ship, an equitable title is not sufficient.

The possession of the master is the possession of the owner. If *M'Connell* originally purchased the ship, and it was proposed to let *Woodward* have a share, the legal interest never passed; it remained in *M'Connell*; and the sums supposed to be paid, would not give him a legal title. The policy of Lord *Liverpool*'s act is to have an evidence of the real property; and to allow any other as an equitable interest, defeats the policy. If the jury, therefore, believe that *Woodward* was acting as master, the action cannot be maintained.

The jury found a verdict for the Defendant.

Lens,

Lens, Serjt. *Bailey*, Serjt. and *Littledale* for the Plaintiff.

Cockell, *Shepherd*, *Marshall*, *Beſt*, Serjt. and *Eſpinaſſe* for the Defendant.

HURRY and SCHNEIDER *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

March 3d.

Where a policy is on goods until ſafely landed, if a merchant takes the goods out of the ſhip into his own lighter, the policy is diſcharged; yet it is not ſo if put into public lighters regiſtered at Waterman's Hall, in caſe the goods are loſt from on board the lighter.

THIS was an action on a policy of inſurance on the ſhip *Royaliſt* and goods on board, from *Peterſburgh* to *London*, including riſque of boats, beginning the adventure on the goods from the loading on board the ſaid goods with boats at *Peterſburgh*, and the ſhip at *Cronſtadt*, to continue upon the ſhip until ſhe ſhould arrive in *London*, and moored twenty-four hours in ſafety; and upon the goods until diſcharged and ſafely landed.

The ſhip arrived in the river, and on the 9th of *June* the goods were taken out of the ſhip, and put into a lighter; it was moored alongſide the wharf. While the lighter lay there, it ſunk, and the goods were ſpoiled.

It appeared further in evidence, That the Plaintiffs, who were conſignees of the goods, employed and paid the lighterman, into whoſe lighter the goods had been put; but that the lighterman was a public lighterman, and regiſtered at *Waterman's Hall*, and not the private ſervant of the Plaintiffs. No default was imputed to the lighter; and it was alſo proved to be the conſtant uſage of

the

the *Ruſſia* merchants to land their goods by means of thoſe public regiſtered lighters.

The Defendant's counſel, on this evidence, relied, That by the delivery of the goods out of the ſhip to the lighter, employed by the aſſured, that the policy was at an end; and cited *Sparrow* v. *Carruthers*, 2 *Stra.* 1236, as expreſsly in point.

The Plaintiff's counſel contended, That this was a loſs covered by the policy. That the delivery to a lighter of the deſcription of that on which the goods were put on board, being a delivery according to the uſage of the trade; and did not diſcharge the underwriter until the goods were landed out of the lighter: but they chiefly relied on a caſe of *Rucker* v. *London Aſſurance Company*, which was tried at *Guildhall* before Mr. Juſtice BULLER (Sittings after Eaſter Term 1784); in which it had been ruled by that Judge, That though a delivery to a private lighter, employed by the conſignees, diſcharged the underwriter from the time they were ſo taken on board, it was otherwiſe where the goods were delivered to a common and public lighter, entered regularly at *Waterman's Hall*. The delivery in the latter caſe could not be held to be a delivery to the conſignee until they were landed.

Lord ELDON. This is a policy of inſurance on ſhip and goods from *Peterſburgh* to *London*; and the clauſe in the policy on which the queſtion in this caſe ariſes is, "That the policy ſhall continue on the ſhip until ſhe is arrived in *London*, and moored in good ſafety for twenty-four hours; and upon the goods and merchandize, until there diſcharged

charged and safely landed." It appears in evidence, That the goods were taken from on board the ship after her safe arrival in the *Thames*, and lost before they were landed. As the policy is on the goods "until they are safely landed," I think it is incumbent on the underwriter to shew how he is discharged from this part of his express undertaking.

The case of *Sparrow* v. *Carruthers*, was decided before Mr. Justice LEE, who was a very great lawyer: he held the underwriter not to be liable until the goods were actually landed, by reason of the delivery before the landing to the consignee himself. He would not look to the custom or usage, where there was a written contract between the parties: I shall feel disposed to hold the same doctrine: but I adopt the same distinction taken by Mr. Justice BULLER, and the doctrine which he has laid down in the case cited. The ground of his determination was, That if the merchant sends his own lighters, he takes the risque on himself; but if he sends a lighterman, registered at *Waterman's Hall*, he is a person to whom public credit is given; and he is not to be considered merely as the lighterman of the consignee, but the common lighterman of both parties. This doctrine I hold, not because the case before Mr. Justice BULLER was the last determination on the subject, but because I think it is founded on grounds of law.

As, therefore, the goods in question were put into possession of a public lighterman in the regular course

courſe of diſcharging the cargos of veſſels in the trade on which this policy was underwritten, and the loſs happened before the goods were landed, I am of opinion, that the underwriters continued liable; and that the Plaintiffs are entitled to recover.

Verdict for the Plaintiffs.

Shepherd, *Heywood*, and *Bailey*, Serjts. and *Giles* for the Plaintiffs.

Park, *Lens*, and *Beſt*, Serjts. for the Defendant.

In the next term this caſe was moved in the court of Common Pleas, when the court agreed in opinion with the Lord Chief Juſtice.

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IN an action for words, charging the Plaintiff with having been acceſſary to a felony, which the Defendant juſtifies, it is competent to him to prove the principal felon guilty, though he may have been acquitted. *Cook* v. *Field.* - *Page* 134

So where a perſon is indicted as acceſſary to a felony, he may go into evidence to prove the principal felon innocent, though he may have been convicted. *ib.*

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An action cannot be maintained for money which has been the object of a ſet-off in a former action between the ſame parties. *Hennell* v. *Fairlamb.* 104

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If a ſhip is put up at the Exchange and *Lloyd's* Coffee-houſe by the broker, as a general ſhip, warranted to ſail with convoy, and hand-bills are

are put about to the ſame effect, this is ſuch a repreſentation as will bind the principal. *Runquiſt* v. *Ditchell.* *Page* 64

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Bankrupt.

In a joint action againſt two, if one pleads bankruptcy, he ſhall not be thereby made a witneſs for the other Defendant. *Raven* v. *Dunning et alt.* 25

Where a bankrupt has ſurrendered within the forty-two days under his commiſſion, and has ſubmitted to his laſt examination, the commiſſioners by their own authority may enlarge the time for completing his laſt examination, and he is protected thereby from arreſts during that interval. *Davis* v. *Trotter*, Eſq. 40

So a bankrupt is protected in his attendance on the commiſſioners at a meeting for declaring a final dividend after his laſt examination has been concluded, though only ſummoned verbally by the commiſſioners. *Arding* v. *Flower et alt. P.* 117

Where the wife of a bankrupt has adminiſtered to her father, and become poſſeſſed as adminiſtratrix of effects to which ſhe and infant brothers and ſiſters are entitled, and the huſband has continued the buſineſs of the father for their benefit, that is not ſuch a poſſeſſion as ſhall be deemed an ordering and diſpoſition within the ſtatute 21 *Jac.* I. *Viner* v. *Cadell.* 88

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Where the Defendant pleads bankruptcy, and the Plaintiff relies on the Defendant having been a bankrupt before, it is ſufficient proof of the firſt bankruptcy to produce the proceedings, and to ſhew that the Defendant ſubmitted to that commiſſion. *Gregory* v. *Morton.* 195

Where the aſſignees of a bankrupt (*bona fide*) poſſeſſed of a bill of exchange, by the payment by it of a debt due to the bankrupt's eſtate, which bill, in the courſe of negociation, has been in the poſſeſſion of the bankrupt, and on the diſcounting of which they took uſurious intereſt, that ſhall not impeach the aſſignee's title to it. *Parr* v. *Eliaſon et alt.* 210

Where a trader, having accepted a bill for the uſe of a third perſon, is induced by that perſon to pay the bill,

after having informed him that he was insolvent, on the promise of such person to guarantee the payment of a composition to the trader's creditors, and he afterwards becomes bankrupt, that payment is a fraudulent preference. *Singleton et alt.* v. *Butler.* *Page* 215

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Though a husband is not bound to provide for the children of his wife by a former husband, yet if he take them into his house, and they become part of his family, he shall be deemed to stand *loco parentis,* and be liable on a contract made by his wife for their education. *Stone* v. *Carr.* *Page* 1

Though the husband has lived abroad for many years, and the wife has been paid weekly a sum for her subsistence, and though she has appeared as a *feme sole,* and contracted as such, yet if the husband is living at the time of the action brought, no action can be maintained against the wife. *McNamara* v. *Fisher.* 18

Where the Defendant relies on a coverture as a defence to an action, it is not sufficient evidence that her husband was living at a particular time, to prove the muster of a ship from the Admiralty in which a person of his name is found, without other evidence of his identity. *Barber* v. *Holmes.* 180

The husband is not liable for necessaries furnished to his wife after a tradesman had notice from the husband that she had a separate subsistence; but it is incumbent on the husband to shew that the tradesman had such notice. *Rawlyns* v. *Vandyke.* 250

If a husband living in a state of separation from his wife, suffers his children to reside with their mother, he is liable for necessaries furnished to the children. *ib.* 252

A separate maintenance secured by deed executed by the husband and wife, but not by her trustee, is void; and such a separate

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Where a note is given to a married woman to pay a debt contracted by her in the way of her ſeparate trade, and ſhe indorſes it, the indorſee cannot recover; the Plaintiff ſhould declare on it as a note payable to the huſband; and her indorſement might be good, on proving that he allowed her to do ſo in the way of trade. *Barlow* v. *Biſhop.* 266

Bills of Exchange.

It is no defence to an action on a bill of exchange, that it was an accommodation bill, and that fact known to the Plaintiff. *Smith* v. *Knox.* 46

The holder of a bill of exchange may give a diſcharge to a party whoſe name is on the bill; and ſuch ſhall not operate as a diſcharge to one liable prior in order to him. *Ib.* 47

Aliter, if given to one ſubſequently liable. *ib.*

If the holder of a bill of exchange accept of a ſecurity, or give time to a party on the bill, it is a diſcharge to a party liable ſubſequent to him in order, but not to one liable prior in point of time. *Engliſh* v. *Darley.* 49

Notice of the non-acceptance or non-payment of a bill of exchange is ſufficiently given, if a letter informing the party of it has been regularly ſent by poſt. *Kuſh* v. *Weſton.* *Page* 54

To make a bill of exchange void for an alteration, it muſt be in a material part, as in the ſum, date, &c. *Trapp* v. *Spearman.* 57

If the Defendant ſets up as a defence to a bill of exchange, that it has been forged, and proves it to be ſo, it will be a good anſwer for the Plaintiff to ſhew that the Defendant has paid other bills of the ſame party under ſimilar circumſtances. *Barber* v. *Gingell.* 60

After the diſſolution of a partnerſhip, one of the perſons who compoſed the firm cannot put the partnerſhip name on any negotiable ſecurity, even tho' ſuch exiſted prior to the diſſolution, or was for the purpoſe of liquidating the partnerſhip debts, and the party who ſo indorſed the bill had authority to ſettle the partnerſhip affairs. *Abel* v. *Sutton.* 108

Nothing ſhall diſpenſe with the want of notice to the drawer of the non-payment of a bill of exchange, but the circumſtance of there being no effects of the drawer in the drawee's hands; it is inadmiſſible evidence that the drawer was not damnified for the want of notice. *Dennis* v. *Morris.* 158

Where a bill of exchange was put into circulation by indorſement, though it wanted the words "or order," the inſertion of thoſe words by the drawer, with the conſent of the parties, does not make a new ſtamp neceſſary. *Kerſhaw et alt.* v. *Cox.* 246

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Where a perſon purchaſes goods from the ſheriff, and takes a bill of ſale of them, it differs from a bill of ſale voluntarily given by the debtor as a ſecurity, ſo far that the purchaſer need not take immediate poſſeſſion under the former bill of ſale, but muſt under the latter, or it will be fraudulent. *Kidd* v. *Rawlinſon.* 52

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If a ſhip is put up at the Exchange, and *Lloyd's* Coffee-houſe, by the broker, as a general ſhip, warranted to ſail with convoy, and hand-bills are circulated to the ſame effect, this is ſuch a repreſentation as will bind the principal. *Runquiſt* v. *Ditchell.* *Page* 64

If a broker advances money, and gives his acceptance on the credit of goods lodged in his hands, the owner cannot demand them without a full indemnity; and giving his counter-acceptances, or thoſe of any other perſon, to the amount of thoſe given by the broker, and becoming payable at the ſame time, is not a ſufficient indemnity in law. *Pultney*, Bart. v. *Keymer.* 182

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C.

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Where, by the cuſtom of the trade, a callico-printer is bound to take goods damaged in the printing, the mere circumſtance of their being damaged confers no ſuch property in them as to authorize him to ſell them, unleſs the owner has elected that he ſhould take them. *Laclouch* v. *Towle.* 114

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Where goods are ſent by a carrier as directed by the conſignee, the

the property is ſo out of the conſignor, that he cannot maintain an action for them againſt the carrier, if they are loſt. *Dawes* v. *Peck.* *Page* 12

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In an indictment charging a priſoner with uttering falſe coin, and having counterfeit money in his poſſeſſion, the fact of *uttering* ſhould be diſtinctly charged in the count for the latter offence, and not by reference. *Rex* v. *Kelly et alt.* *Page* 28

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The conſignor cannot maintain an action againſt the carrier who has loſt goods ſent by him according to the orders of the conſignee. *Dawes* v. *Peck.* 12

If goods abroad are put on board a ſhip chartered by the conſignee, the conſignor cannot afterwards ſtop them *in tranſitu.* *Boethlinck* v. *Schneider.* 58

Conſtable.

Where a perſon is appointed conſtable, and he procures a ſubſtitute to ſerve for him who is ſworn in at the leet, and approved of by the inhabitants, if he abſconds, and does not ſerve, the principal is nevertheleſs diſcharged. *Underhill* v. *Witts.* 56

The juriſdiction of magiſtrates cannot be tried in an action againſt their officers; and if the officers have a warrant, whether it be illegal or not, an action cannot be maintained againſt them without a previous demand of a copy of it. *Price* v. *Meſſenger.* 96

Aliter, if the acts complained of were not authorized by the warrant. *ib.*

When the ſtatute 24 *Geo.* III. chap. 44, orders that actions brought againſt conſtables ſhall

be commenced within ſix months after the offence committed, it extends to caſes only where the conſtable is acting under a warrant from a juſtice of peace. *Poſtlewaite* v. *Gibſon* and *Slade*. *Page* 226

Conſcience (Court of)

In an action of debt on a judgment of the court of Conſcience in *London*, the Plaintiff muſt prove that the Defendant when the judgment was obtained, was reſident within its juriſdiction. *Coore* v. *Kennedy*. 280

Contract.

Where, by a clauſe in the ſhip's articles, the ſailors are not to be entitled to their wages until the voyage was ended, and that voyage was to a foreign port, if the maſter for no good or legal reaſon diſmiſs the ſeamen before the ſhip's arrival at ſuch port, they may immediately maintain an action for their wages. *Sigard* v. *Roberts*. 71

Vide *Demiſe*.

Conviction.

Where an act of parliament gives the form of conviction for any offence prohibited by the act, that form muſt be followed; and a warrant granted in a conviction drawn up in any other form is illegal, and the juſtice and them acting under it are treſpaſſers. *Goſs* v. *Jackſon*, Eſq. and *Buſhell*. 198

Copy-right.

If an author makes very conſiderable additions to a work before printed, he obtains a copy-right in the addition, and can maintain an action for an infringement of it. *Carey* v. *Longman*. *Page* 273

Corporation.

A party who has been amoved from being a member of a corporation, and who has been reſtored by mandamus, cannot recover an action for damages againſt the members of the corporation who amoved him by an act done in their corporate capacity, nor recover the coſts of the mandamus. *Harman* v. *Tappenden and others*. 277

Cuſtom-Houſe.

Vide *Ship*.

Cuſtom of Trade.

Vide *Callico-Printer*.

D.

Declaration.

Under a declaration againſt a lighterman in the common form for negligence, the Plaintiff cannot recover, if it appear that the loſs was not occaſioned by the neglect of the common and ordinary duty of the Defendant. *Whalley* v. *Wray*. 74

Where there are ſeveral counts in a declaration for words, laying ſpecial

special damages in every count, the Plaintiff will be entitled, if the words laid are in themselves actionable, though he fail in proving the special damage. *Cook* v. *Field*. P. 134

Vide *Deed*.

Deed.

Where parties contract by deed, but one does not execute, the other may sue in *assumpsit*, notwithstanding the deed. *Sutherland* v. *Lisinan*. 42

It is not necessary that the subscribing witness should see the obligee sign and seal the bond; it is sufficient if that, after he has signed and sealed it, the witness is requested to put his name to it in the presence of the obligee, and it is then stated that the obligor had executed it; and if he does so put his name to it, he is a good witness to prove the execution. *Pack* v. *Mears*. 171

Degree.

A diploma under the seal of the university of St. *Andrew*, is not of itself sufficient evidence to prove the party a doctor of physic. *Moises* v. *Thornton*. 4

Demise.

Where there is a demise of premisses, and an entire rent reserved, if any part of the premisses could not be legally demised, the whole demise is void. *Doe* c. d. *Griffiths* v. *Lloyd*. 78

Desertion.

Vide *Sailor*.

Distress.

In order to justify the landlord in seizing as a distress within thirty days, goods removed off the premisses, the removal must have taken place after the rent became due, and have been secret. *Watson* v. *Main*. P. 15

To support a justification for taking cattle at a distress *damage feasant*, it must appear that the party distraining had actually got into the *locus in quo* before the cattle had got out of it. *Clement* v. *Milner*. 95

E.

Ejectment.

Vide *Demise*.

Evidence.

To prove a person a doctor of physic, according to an averment to that effect in pleading, it is not of itself sufficient evidence to produce a diploma under the seal of the university of St. *Andrew*. *Moises* v. *Thornton*. 4

To prove the laws of a foreign country, it must be done by documents properly authenticated from that country, and not by parol. *Boethlinck* v. *Schneider*. 58

To prove a party dead, the production of the letters of administration granted by the Ordinary,

dinary, is not of itſelf ſufficient evidence. *Thompſon* v. *Donaldſon.* 63

Where the character of the Plaintiff or the Defendant, on the record, is attempted to be impeached in the croſs-examination of the adverſary's witneſſes, if thoſe witneſſes deny the imputation intended to be conveyed, the party ſhall not be at liberty to go into evidence of his character. *King* v. *Francis.* 116

In an action on the caſe for ſeduction, *per quod ſervitium amiſit*, the Plaintiff is not confined to proof of loſs of ſervice only, but may go into evidence of the loſs of comfort in the ſociety of her child, and injury to her feelings as a parent. *Bedford* v. *Mc Kowl.* 119

In an action of treſpaſs againſt officers, the Plaintiff cannot go into evidence of any ſpecial damage ariſing from the acts complained of, if he has brought an action againſt the perſon who gave the information, which is then depending. *Price* v. *Meſſenger.* 100

Where an advertiſement has been publicly circulated as coming from a particular perſon, the publicity of ſuch circulation is evidence to fix him with notice of its contents. *Runquiſt* v. *Ditchell.* 64

In caſe for giving a falſe character, it is evidence againſt the Defendant, that he recommended the perſon truſted to another perſon, who was called as a witneſs. *Beal* v. *Thatcher.* 134

To prove payment of a debt due by the Defendant to the Plaintiff, a banker's check drawn by the Defendant on his banker, and which appeared to have been received by the Plaintiff, is evidence to go to the jury of the payment. *Egg* v. *Barnett*, Gent. 196

Where premiſſes have been demiſed by an agreement in writing, but not on ſtamped paper, the Plaintiff is bound to give the writing in evidence; and if not ſtamped at the trial, the Plaintiff ſhall be nonſuited, and ſhall not be allowed to go to uſe and occupation generally. *Brewer* v. *Palmer.* 213

Muſter-roll of a ſhip not evidence of itſelf of a particular perſon being living. *Barber* v. *Holmes.* 190

Lloyd's books are evidence of a capture, not of notice of a loſs to any perſon in particular; but, coupled with other evidence, may go to the jury. *Abel* v. *Potts.* 242

Vide *Bill of Exchange, Apprentice, Bankrupt, Deed.*

Exciſe.

An exciſe-officer is not liable to an action of treſpaſs for breaking and entering an houſe to ſearch for run goods, under a warrant from the commiſſioners, though he may not find any. *Cooper* v. *Booth.* 135

The commiſſioners are to judge of the reaſonableneſs of the ſuſpicion; and if they grant a warrant, it will be a juſtification to the officer. *ib.*

Foreign

F.

Foreign Country.

Vide *Evidence.*

Forgery.

If the Defendant ſets up as a defence to an action on a bill that it is a forgery, and proves it to be ſo, it will be a good anſwer for the Plaintiff to ſhew that the Defendant has paid other bills of the ſame party under ſimilar circumſtances. *Barber* v. *Gingell.* *P.* 60

A party in cuſtody on a charge of forgery of a bill of exchange, is a competent witneſs to prove payment of it, on an action brought to recover the amount of it. *ib.*

Frauds (Statute of)

If a tradeſman, having goods in his poſſeſſion, on which he has a lien, parts with thoſe goods on the promiſe of a third perſon to pay the amount of his demand, ſuch promiſe is not within the ſtatute of frauds. *Houlditch* v. *Milner.* 86

A trader who is in the habit of delivering printed bills of parcels to which his name is ſpecified, delivers one containing the quantity and price of the articles, it is a good note in writing, within the ſtatute of frauds, particularly if it is reſorted to by a ſubſequent letter. *Saunderſon* v. *Jackſon* and *Hanker.* 180

Freight.

Vide *Ship.*

G.

Game.

In an action of debt on the game-laws, the pariſh laid in the declaration is only for a *venue*; and the Plaintiff may prove the Defendant guilty at any other pariſh within the county. *Clarke*, Eſq. v. *Tayler.* *P.* 216

Gaoler.

Where, by the regulation of a priſon, made by the magiſtrates, certain rates are ſettled for lodging, &c. within the priſon, the gaoler cannot take more than that ſum; and if he does, he ſhall be liable to refund it, though he has paid it over to the magiſtrates to whom he accounts. *Miller* v. *Aris.* 231

H.

Habeas Corpus.

Where a perſon is ſent over from *Ireland*, under a warrant from the Secretary of State for *Ireland*, charged with any offence, and is committed to priſon till he can be brought before a judge, and the warrant is left with the gaoler, it is ſuch a commitment and warrant as the priſoner is entitled to a copy under the *Habeas Corpus*, after it has been demanded. *Sedley* v. *Arbouin*, Executor of *Weſt* deceaſed. 134

Horſe.

To an action for the price of an horſe, it is no defence that the warranty

warranty was untrue, if the Defendant was ſhortly after the ſale apprized of the defect of the warranty, and did not return the horſe, but afterwards, by the application of medicines or otherwiſe, has leſſened the value of the horſe from what it was at the time of the ſale. *Curtis* v. *Hannay*, Bart. P. 82

I.

Improvements.

Vide *Rent.*

Indictment.

A party acquitted on an indictment with calling witneſſes, cannot maintain an action for malicious proſecution, if the evidence was ſuch as to cauſe the jury to heſitate on his acquittal. *Smith* v. *Macdonald.* 7

A party entitled to a ſhare of the penalty given by 21 *Geo.* III. ch. 37, is a good witneſs, on an indictment under the ſtatute.

On an indictment, charging a party as being acceſſary to a felony, where the principal felon has been convicted, it is competent for the Defendant to ſhew that he was innocent. *Cook* v. *Field.* 134

Infant.

The huſband of the mother of children by a former huſband, may be made liable for their education, on a contract made by the wife, if they are taken under the roof of the ſecond huſband, as a part of his family. *Stone* v. *Carr.* 1

Where the Plaintiff declares on a joint contract, and one Defendant pleads infancy, the Plaintiff cannot enter a *nolle proſequi*, and proceed againſt the other Defendant in the action, but muſt commence a new action againſt the adult Defendant alone. *Chandler* v. *Parks et alt.* P. 76

And in ſuch caſe, the infancy of one of the contracting parties will be a good replication to a plea in abatement, that both ſhould be ſued *comme ſembler.* ib.

Infancy.

Where the cauſe of action accrued in *Scotland*, and infancy pleaded, the Defendant muſt ſhew that infancy is a legal defence to the demand, by proving the law of that country in that reſpect. *Male* v. *Roberts.* 163

If an infant make a new promiſe to pay on his coming of age, *when he is able*, proof of oſtenſible ability is ſufficient for the Plaintiff, unleſs contradicted by evidence by the Defendant. *Cole* v. *Saxby.* 159

Inſolvent.

Where a compoſition-deed or inſtrument is entered into by an inſolvent with a clauſe, that if certain creditors do not ſign the deed, it ſhall be null and void, if ſuch creditors accept the compoſition on the ſecurity for the compoſition, though they do not actually ſign them, it is valid and good. *Jolly et alt.* Aſſignees of *Norton* v. *Wallis.* 288

An

An agreement to accept a compoſition where there is no aſſignment of the trader's effects, is not an act of bankruptcy. *Ib.* P. 223

Inſurance.

The ſlip of paper on which underwriters take down the riſques they inſure, is not ſuch an inſtrument as an action could be maintained upon. In order to enforce an undertaking of this nature, it muſt be on a ſtamped policy. *Rogers* v. *McCarthy.* 106

If a ſhip is warranted to ſail with convoy from the place of rendezvous, ſhe muſt receive her ſailing inſtructions at that place, or the warranty is not complied with. *Anderſon* v. *Pitcher.* 124

Under the averment in the declaration on a policy of inſurance, "That the party is intereſted to the whole amount of the money inſured," an intereſt in a part will entitle him to receive. *Page* v. *Fry.* 185

Where, by a memorandum of a policy, the underwriter was to adjuſt the loſs in three months after notice, a direct notice from the aſſured is not required, if he has had notice by other means. *Abel* v. *Potts.* 242

Upon the firſt notice of a total loſs, the aſſured are bound to abandon; but it muſt appear that they had notice, as the policy will not be vitiated. *Abel* v. *Potts.* 244

Where ſickneſs of the maſter and crew is ſet up as an excuſe for devaſtation, it is incumbent on the Plaintiff to ſhew that proper medicines and neceſſaries for the voyage were on board, in a caſe where the nature of the voyage requires that there ſhould be a ſurgeon on board. *Woolf* v. *Claggat.* P. 257

Where a policy is on goods until ſafely landed, if a merchant takes the goods out of the ſhip into his own lighter, the policy is diſcharged; yet it is not ſo if put into public lighters, regiſtered at *Waterman's Hall*, in caſe the goods are loſt on board the lighter. *Hurry* and *Schneider* v. *Royal Exchange Aſſurance Company.* 289

Joint and Several.

Where there are three joint leſſees, and two of them aſſign their intereſt to a third, but the landlord has not conſented to accept his ſole liability, the goods of the Plaintiff being put on the premiſſes by permiſſion of ſuch third leſſee, and diſtrained by the landlord for rent, and the Plaintiff having paid the money, held that the three leſſees were liable. *Exall* v. *Partridge.* 8

Vide *Infant, Bankrupt.*

Juriſdiction.

The juriſdiction of magiſtrates cannot be tried in an action againſt their officers. *Price* v. *Meſſenger.* 96

Juſtices.

Vide *Conſtable, Juriſdiction, Officers.*

Juſtification.

To ſupport a juſtification for taking cattle as a diſtreſs, *damage*

mage feaſant, it muſt appear that the party diſtraining had actually got into the *locus in quo* before the cattle diſtrained had got out of it. *Clement* v. *Milner*. P. 95

In an action for words, imputing an offence of which the party has been acquitted, the Defendant may juſtify and prove the Plaintiff to have been guilty, notwithſtanding ſuch acquittal. *England* v. *Bourke*. 80

So in an action for words, charging the Plaintiff with being acceſſary to a felony, where the principal felon has been acquitted, the Defendant may prove that he was guilty. *Cook* v. *Field*. 134

L.

Landlord and Tenant.

Tenant on leaving premiſſes which he has rented, may take away *Dutch* barns. *Dean* v. *Allaley*. 11

What fixtures he may remove at the expiration of his term. 12

The landlord cannot juſtify ſeizing as a diſtreſs, goods removed off the premiſſes, under ſtat. 11 *Geo.* II. unleſs the removal has been ſecret, and has taken place prior to the rent being due. *Watſon* v. *Main*. 15

Leaſe.

In a leaſe of lands for which the leſſor is bound to reſerve the beſt rent that can be got at the time the leaſe is made, he muſt do ſo without any regard to a former leaſe on which the rent had been fairly ſerved or allowed, claimed on account of improvement made by the tenant. *Doe ex dem. Griffiths* v. *Lloyd*. P. 79

Libel.

The proprietor of a newſpaper is anſwerable criminally, as well as civilly, for a libel publiſhed in his paper, though he has nothing to do with the publication, and the whole is conducted by his ſervant. *Rex* v. *Walter*. 21

Licence.

Where a licence to give advanced wages is obtained under the act for regulating the wages of ſeamen in the *Weſt India* trade, it muſt ſpecify the amount of the wages permitted to be given. *Rodgers* v. *Lacey*. 43

Lien.

If, by the cuſtom and uſage of trade, a party is entitled to a lien on goods for a general balance, and he gets poſſeſſion of the goods of his debtor, he may hold them till ſatisfied his whole demand, though part of it be barred by the ſtatute of limitations. *Spears* v. *Hartly*. 81

If a tradeſman, having goods in his poſſeſſion on which he has a lien, parts with thoſe goods on the promiſe of a third perſon to pay the amount of his demand, ſuch promiſe is not within the ſtatute of frauds. *Houlditch* v. *Milner*. 86

Where deeds reſpecting real property have been depoſited as a ſecurity, it implies an intention of charging the real property, and gives the party with whom they

they are depoſited a lien upon them. *Richards* v. *Borrett*. *P.* 102

Callico-printers have a lien for a general balance on goods delivered to them to print. *Weldon* v. *Gould*. 268

Where callico goods are delivered to a perſon to have them printed, and ſuch perſon delivers them to a callico-printer for that purpoſe, to whom he is then indebted, the callico-printer may hold theſe goods againſt the owner, by virtue of his lien. *ib.* 268

Lighterman.

Vide *Declaration.*

Limitations (Statute of)

Where money has been paid on account by two Defendants, an acknowledgement by one within ſix years, ſhall prevent the ſtat. of limitations from attaching againſt the other. *Clark* v. *Bradſhaw* and *Coghlan*. 155

If a Defendant upon whom a demand is made, ſay, That he is protected by the length of time the money has been due, it is an acknowledgement of the debt, and ſhall charge him. *ib.* 157

Where the whole of a bond has been paid by one obligor, and he brings *aſſumpſit* againſt his co-obligor for contribution, query, Is *non-aſſumpſit infra ſex annos*, a good plea? or is not there the ſame limitation to ſuit a demand as to the bond itſelf? *Cole* Executor of *Cole* v. *Saxby*. 161

Vide *Lien.*

M.

Magiſtrate.

If goods which have been ſeized and brought to the magiſtrates office, were afterwards reſtored as having been ſeized illegally, and the party cannot remove them without a permit, it is the duty of the magiſtrate to procure ſuch permit. *Price* v. *Meſſenger*. *Page* 100

The juriſdiction cannot be tried in an action againſt their officers. *ib.*

Vide *Officer.*

Malicious Proſecution.

If a party is indicted for a felony, though he is acquitted without calling witneſſes, he cannot maintain an action for malicious proſecution, if his acquittal was the reſult of deliberation, and the evidence ſufficient to cauſe the jury to pauſe. *Smith* v. *Macdonald*. 7

An action will not lie for maliciouſly holding a man to bail, unleſs it appeared that the Plaintiff knew that the debt was leſs than 10*l.*, and not where it is for a diſputed balance. *Jackſon* v. *Burleigh*. 34

Where a cauſe has been referred, and the arbitrator finds on the examination of the Plaintiff's own books, and on his evidence, that he had no cauſe of action, an action for maliciouſly holding the party to bail cannot be ſupported on the evidence of the arbitrator. *Haberſhon* v. *Troby*. 38

In an action for malicious proſecution, in which the Plaintiff charged

charged the Defendant with having impoſed on him the crime of felony, by reaſon of which he was impriſoned, and on production of the information before the juſtice there is no charge of felony, though the warrant was to arreſt the Defendant for felony, the evidence does not ſupport the declaration; and the Plaintiff ſhall be nonſuited. *Leigh* v. *Webb.* 163

If a party makes a complaint before a juſtice of peace, which the juſtice conceives to amount to felony, and iſſues his warrant accordingly to arreſt the party complained againſt, and the fact does not amount to felony, no action for a malicious proſecution will lie againſt the party who made the complaint. *ib.* 166

Marriage.

In an action for breach of promiſe of marriage, when the defence is, That the Plaintiff was a woman of bad character, which a witneſs heard of her in the neighbourhood where ſhe lived, is good evidence. *Foulks* v. *Sellway.* 236

Maſter and Servant.

A ſervant who comes over from the *Weſt Indies*, where he has been a ſlave, and who continues in the ſervice of his maſter without any agreement for wages, is not entitled to any, unleſs there has been an expreſs promiſe. *Alfred* v. *Marquis Fitzjames.* 3

A journeyman by whom goods have been delivered, is a good witneſs to prove the delivery without a releaſe. *Adams* v. *Davies.* *Page* 48

Where a perſon has dealt with a tradeſman on credit, it is not ſufficient to give notice to the ſervant that he meant to pay ready money in future; it muſt be given to the maſter himſelf. *Gratland* v. *Freeman.* 85

An action will not lie at the ſuit of the ſervant againſt his maſter for not giving him a character. *Carol* v. *Bird.* 201

Where the maſter of a family is in the habit of paying ready money for articles furniſhed in certain quantities to his family, if the tradeſman ſuffers other goods of the ſame to be delivered without informing the maſter, and ſatisfying himſelf that they were for his uſe, when, in fact, they were not, the maſter ſhall not be liable. *Pearce* v. *Rogers.* 114

Vide *Broker.*

N.

Newſpaper.

The proprietor of a newſpaper is anſwerable criminally, as well as civilly, for publiſhing a libel in his paper, even though the whole has been conducted by his ſervant, and he has had no concern in it. *Rex* v. *Walter.* 21

Nolle Proſequi.

Where a Plaintiff declares on a joint contract, and one Defendant pleads infancy, the Plaintiff cannot enter a *nolle proſequi* and proceed againſt the adult Defendant, but ſhould commence an

an action againſt the adult only; and the infancy of the other will be a good replication to a plea in abatement *Chandler* v. *Parks*. *Page* 77

Notice.

Notice of the non-payment or non-acceptance of a bill of exchange, is ſufficiently given by putting a letter regularly into the poſt, containing ſuch notice. *Kuſh* v. *Weſton*. 54

Vide *Evidence*, *Maſter* and *Servant*.

O.

Officer.

Officers are not liable for any injury done to property ſeized by them, after they have brought it to the office of the magiſtrates. *Price* v. *Meſſenger*. 97

In an action of treſpaſs againſt officers for ſeizing goods and impriſoning Plaintiff, he cannot go into evidence of any ſpecial damage, if he has brought an action againſt the perſon who gave the information on which the officers acted, and which is then depending. *ib*. 101

In an action of debt to recover the penalties againſt a ſheriff's officer, for taking more than is allowed by act of parliament in an arreſt; if the Plaintiff fails in proving his caſe ſo as to entitle himſelf to the penalties, he may recover on the counts for money had and received, the overplus paid above what is allowed by the ſtatute. *Lovell* v. *Simpſon*. 153

If a maſter turns away a ſervant without a previous notice or warning, the ſervant is entitled to a month's wages. *Robinſon* v. *Henderſon*. *Page* 235

Vide *Conſtable*, *Exciſe*, *Regiſtry*.

Owners.

Vide *Ship-Regiſtry*.

P.

Pariſh-Officers.

Pariſh-officers are bound to take care of caſual poor; and if a perſon, not a pariſh-officer, takes care of a perſon coming under the deſcription of caſual poor, he may maintain an action againſt the officers for the expences incurred on the occaſion. *Simmonds* v. *Wilmot*. 91

Parſon.

In debt againſt a parſon for non-reſidence, it is a good defence that, from the unhealthfulneſs of the place, he could not reſide there but at the riſque of his life. *Scammell* q. t. v. *Willett*. 29

An action cannot be maintained againſt a parſon for not taking away his tythes, unleſs they have been properly ſet out. *Moyes* v. *Willett*. 31

Vide *Tythes*.

Particular of Plaintiff's Demand.

If the Plaintiff delivers a particular of his demand under a judge's order, "for goods ſold and

and delivered to the Defendant," he cannot go into evidence of a demand for goods of the Plaintiff ſent to him to be ſold as agent for the Plaintiff, and for which he has received the value, and recover that value as money had and received. *Holland* v. *Hopkins.* *Page* 168

Partner.

After the diſſolution of a partnerſhip, one of the perſons who compoſed the firm cannot put the partnerſhip on any negotiable ſecurity, even though ſuch exiſted prior to the diſſolution of the partnerſhip, and was for the purpoſe of liquidating the partnerſhip debts. *Abel* v. *Sutton.* 108

Where there are ſeveral names compoſing a firm, but part are memorial only, and not intereſted in the profits, in a declaration on a bond of indemnity to ſecure money advanced to a third perſon, and the breach ſtates the money to be paid by the partners only who are intereſted in the profits, it is good, though the money was paid on bills drawn on the firm compoſed of all the partners. *Robert Harriſon*, ſurviving partner of *Thomas Harriſon* v. *Fitzhenry.* 238

Where a partnerſhip has exiſted, but one of the partners has retired without notice having been given in the *Gazette*, and the name of the firm is ſtill preſerved, a perſon dealing with the firm after the diſſolution, may ſtill call upon all the original parties, unleſs he had notice, or knew that one of them had retired. *Parkin* v. *Carruthers et alt.* *Page* 148

Perils of the Sea.

Where there is an exception in a charter-party of perils of the ſea, a loſs from the ſhip running foul of another by misfortune, is within the exception, and is a loſs by perils of the ſea. *Buller* v. *Fiſher.* 67

Vide *Carrier.*

Pleading.

Under a declaration againſt a lighterman in the common form for negligence, the Plaintiff cannot recover, if it appear that the loſs was not occaſioned by a neglect of the common and ordinary duty of the Defendant. *Whalley* v. *Wray.* 74

Where parties contract by deed, but one does not execute it, the other may declare in *aſſumpſit*, notwithſtanding the deed. *Sutherland* v. *Liſſnan.* 42

In a joint action againſt two, where one pleads infancy, the Plaintiff cannot enter a *nolle proſequi*, and proceed againſt the other. *Chandler* v. *Parks.* 76

And if he ſues the adult Defendant only, and he pleads in abatement that the other ſhould be joined, the infancy of the other will be a good replication to ſuch plea. *Chandler* v. *Parks.* 76

Vide *Slander.*

Poor.

Vide *Pariſh-Officer.*

Practice.

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Though the Plaintiff's counſel may have ſet out with only claiming the balance of a ſettled account, if he fails in proving it, he ſhall not be precluded from going into evidence to charge the Defendant with money had and received to the Plaintiff's uſe. *Murray* v. *Butler.* *Page* 105

Where the character of the Plaintiff or the Defendant on the record is attempted to be impeached in the croſs-examination of the adverſary's witneſſes, if thoſe witneſſes deny the imputation intended to be conveyed, the party ſhall not be at liberty to go into evidence of his character. *King* v. *Francis.* 116

In an action on the caſe for ſeduction, *per quod ſervitium amiſit*, the Plaintiff is not confined to proof of the loſs of ſervice only; he may go into evidence of the loſs of comfort in the ſociety of his child, and injury to his feelings as a parent. *Bedford* v. *McKowle.* 119

Principal and Acceſſary.

Vide *Acceſſary.*

Promiſe.

If the Plaintiff to a plea of infancy replies a new promiſe after full age, and the evidence is of a promiſe to pay "when the party is able," the Plaintiff muſt prove that the Defendant was of ability; but it is ſufficient to give evidence of ability from oſtenſible circumſtances and appearances in the world. *Cole* Executor of *Cole* v. *Saxby.* *Page* 159

R.

Regiſtry.

Where the owners of a ſhip belonging to an out-port have regularly conveyed away their intereſt, and the certificate of regiſtry has been entered with the proper officer of that port, and a copy tranſmitted to the cuſtom-houſe in *London*, an omiſſion of the officer in *London* to make the entry in the cuſtom-houſe books there, ſhall not ſubject the parties as owners. *Ratchford* v. *Meadows.* 69

Releaſe.

A journeyman by whom goods have been delivered, is a good witneſs to prove the delivery without a releaſe. *Adams* v. *Davis.* 48

Aliter, if it was cuſtomary to pay him for the goods. *ib.*

Vide *Bill of Exchange.*

Rent.

The landlord cannot juſtify under ſtat. 1 *Geo.* II. ch. 191, ſeizing goods removed off the premiſſes as a diſtreſs for rent, unleſs the removal has been ſecret, and has taken place after the rent became due. *Watſon* v. *Main.* 15

In a leaſe of lands for which the leſſor is bound to reſerve the beſt rent that can be got at the time the leaſe is made, he is bound to do ſo, without any regard to a former leaſe in

which the rent might have been fairly reſerved, or to an allowance claimed on account of improvements made by the tenant. *Doe* e. d. *Griffiths* v. *Lloyd.* 79

S.

Sailor.

Where ſailors have gone on ſhore on the ſhip's duty, and when the boat is about to return, requeſt permiſſion to remain on ſhore to get ſome victuals, which is refuſed, and the boat goes without them, if they afterwards go on board, and offer to return to their duty on board the ſhip, it is not deſertion. *Sigard* v. *Roberts.* 71

Where, by a clauſe in ſhip-articles, the ſailors are not to be entitled to their wages until the voyage is ended, and that voyage was to a foreign port, if the maſter for no good or legal cauſe, diſmiſs a ſeaman before the ſhip's arrival, he may immediately maintain an action for his wages. *ib.* 72

If a maſter of a ſhip, by inhuman treatment, compels a ſailor to quit a ſhip, it is not ſuch a deſertion as ſhould amount to a forfeiture of his claim for his wages for the voyage performed. *Limland* v. *Stephens.* 269

Vide *Ship.*

Sale.

The conditions of ſale by auction printed and paſted up under the auctioneer's box, where he declares that the conditions are as uſual, is ſufficient notice to purchaſers of the conditions. *Meſnard* v. *Aldridge.* 271

Set-off.

An action cannot be maintained for a demand which was the object of ſet-off in a former action between the ſame parties. *Hennell* v. *Fairlamb.* P. 104

But may for the ſurplus beyond what was ſufficient to ſatisfy the former demand. *ib.*

Sheriff.

Vide *Bankrupt, Bill of Sale, Officer.*

Ship.

If the owners of a ſhip charter her out for a voyage, and the perſon to whom ſhe is chartered let her to freight, the owners are not liable. *James* v. *Jones.* 27

If a ſhip is captured in the courſe of her voyage, and afterwards recaptured, and arrives at the port of her deſtination, the ſailors are entitled to wages.

But if a *foreign* ſeaman, captured on board an *Engliſh* ſhip, enter into the ſervice of the enemy, though the ſhip be afterwards recaptured, and complete her voyage, he ſhall *not be entitled to wages. Bergſtrom* v. *Mills.* P. 36

If a ſhip is put up at the Exchange and the Coffee-houſe by the ſhip's broker, as a general ſhip, warranted to ſail with convoy, and hand-bills are put about to the ſame effect, this is ſuch a repreſentation as will bind the principal. *Runquiſt* v. *Ditchell.* 64

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In an action for treſpaſs againſt the ſheriff, it is ſufficient evidence to ſhew a bill of ſale executed by him, of the property in queſtion, which recites the writ, the taking, and the ſale of the property by him under it. *Woodward* v. *Larking*. 286

If a ſhip's regiſter, taken from the Cuſtom-houſe, recites, That ſhe was a veſſel captured by the enemy, ſold to a neutral ſubject, and by him to a *Britiſh* ſubject, it is *prima facie* evidence of property. *ib.* 287

To prove the transfer of a ſhip by a *French* bill of ſale, verified by a notarial act, and a copy of the original act, is evidence. *ib.* 288

To maintain treſpaſs for taking a ſhip, an equitable title is ſufficient. *ib.* *ib.*

Vide *Charter-Party*, *Licence*, *Sailor*.

Slander.

No action is maintainable for words ſpoken by a party in giving charge of another to an officer, or in preferring a complaint before a magiſtrate. *Johnſon* v. *Evans*. 32

In an action for charging the Plaintiff with a crime of which he has been acquitted, the Defendant may juſtify and prove the Plaintiff to have been guilty, notwithſtanding the acquittal. *England* v. *Bourk*. *P.* 80

In a declaration for words, with ſpecial damage in every count, the Plaintiff will be entitled to a verdict, though he proves no ſpecial damage, if the words are in themſelves actionable. 80

So in an indictment againſt a perſon, charging him as acceſſary to a felony, where the principal thief has been convicted, the Defendant is at liberty to prove him innocent; and,

Where there is a juſtification of words, amounting to a charge of felony, and a verdict for the Defendant, the Plaintiff may be put on his trial for the felony upon that finding, without the intervention of a grand jury. *Cook* v. *Field*. 133

Vide *Acceſſary*, *Newſpaper*.

Stamp.

A memorandum on the back of a debt, altering ſome of the terms, does not require to be ſtamped. *Herne et alt.* v. *Hale*. 237

Vide *Brewer* and *Palmer*, title *Evidence*, *Inſurance*.

Statutes.

Hen. VIII. 21 ch. 13. *Non-reſidence* - - 29
Jac. I. 21 — 19. *Bankrupt* - - 88
Geo. III. 21 — 37. *Exporting Machinery* 68
——— 37 — 73. *Weſt India Trade* 43

Subſtitute.

Vide *Conſtable*.

Surety.

Where a party becomes ſecurity by bond for the payment of money

money advanced to a third perſon, and by the conditions of the bond, is to pay after notice, if the party has left his houſe, it is ſufficient for the obligee of the bond to make reaſonable enquiries after; and laches are not imputable to him if he does ſo. *Robert Harriſon*, ſurviving partner of *Thomas Harriſon* v. *Fitzhenry*. P. 240

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In a joint action of treſpaſs, the Plaintiff ſhould go for one treſpaſs done at the ſame time in which they were implicated; and if it goes for a treſpaſs done at a time when all were not preſent, he ſhall not afterwards be allowed to go for a time when they were. *Sedley* v. *Sutherland* and others. 402

Vide *Conſtable*, *Exciſe-Officer*.

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Truſtees, by ſubmitting matters to arbitration, do not thereby make themſelves perſonally liable. *Davis* v. *Ridge*. 102

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An action cannot be maintained againſt a parſon for not taking away tythes, unleſs they have been properly ſet out. *Mayes* v. *Willett*. 31

The tythe of hay is not to be ſet out in the ſwath. *ib.*

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If a party, who is liable on bills of exchange, or other ſecurities, upon which uſurious intereſt has been taken, on being called upon for payment of the bills or ſecurities by a *bona fide* holder, and agrees to give a bond for the amount of theſe bills or ſecurities, it is a good and legal ſecurity; and the obligor cannot ſet up the uſury as a defence to an action on the bond. *Cuthbert* v. *Haley.* 22

Aliter, of a *particeps criminis*, who holds bills or notes uſuriouſly taken; he cannot by the ſubſtitution of another ſecurity recover the amount of the bills or notes. *ib.*

If a Defendant undertakes to pay the Plaintiff the difference between taxed coſts and coſts out of pocket, in conſideration of the Plaintiff's giving him time for payment of a debt recovered and the coſts, is not uſury. *Barnet* v. *Stone.* 209

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In assumpsit for use and occupation of apartments which the Defendant had quitted without giving notice, the Plaintiff having put up a bill to let the apartment, will not prevent his recovering. *Redpath* v. *Roberts.* *Page* 225

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If a party, who is liable on bills of exchange, or other securities, upon which usurious interest has been taken, on being called upon for payment of the bills or securities by a *bona fide* holder, and agrees to give a bond for the amount of these bills or securities, it is a good and legal security; and the obligor cannot set up the usury as a defence to an action on the bond. *Cuthbert* v. *Haley.* 22

Aliter, of a *particeps criminis*, who holds bills or notes usuriously taken; he cannot by the substitution of another security recover the amount of the bills or notes. *ib.*

If a Defendant undertakes to pay the Plaintiff the difference between taxed costs and costs out of pocket, in consideration of the Plaintiff's giving him time for payment of a debt recovered and the costs, is not usury. *Barnet* v. *Stone.* 209

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The general authority given by the appointment of constables and surveyors to the *Shadwell* police-office, they cannot take a person into custody without a special warrant. *Rex* v. *Lawson* and others. 262

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If a ship be warranted to sail with convoy from the place of rendezvous, she must receive her sailing orders at that place, or the warranty is not complied with. *Anderson* v. *Pitcher.* 124

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Treſpaſs.

To ſupport a juſtification in treſpaſs for taking cattle *damage feaſant*, it muſt appear that the perſon diſtraining had actually got into the *locus in quo* before the cattle had got out of it, or the juſtification cannot be ſupported. *Clement* v. *Milner*. *Page* 96

In a joint action of treſpaſs, the Plaintiff ſhould go for one treſpaſs done at the ſame time in which they were implicated; and if it goes for a treſpaſs done at a time when all were not preſent, he ſhall not afterwards be allowed to go for a time when they were. *Sedley* v. *Sutherland* and others. 202

Vide *Conſtable*, *Exciſe-Officer*.

Truſtees.

Truſtees, by ſubmitting matters to arbitration, do not thereby make themſelves perſonally liable. *Davis* v. *Ridge*. 102

An admiſſion by one truſtee will not bind his co-truſtees. *ib.*

Tythes.

An action cannot be maintained againſt a parſon for not taking away tythes, unleſs they have been properly ſet out. *Moyes* v. *Willett*. 31

The tythe of hay is not to be ſet out in the ſwath. *ib.*

V.

Variance.

If the declaration on a ſpecial agreement, as the foundation of the Plaintiff's action, that the Defendant was by his means enabled to receive a ſum of money, and the evidence is that he was enabled to receive ſtock, it is a variance. *Jones* v. *Brindley*. 205

Under-

U.

Underwriter.

Vide *Insurance.*

Use and Occupation.

In assumpsit for use and occupation of apartments which the Defendant had quitted without giving notice, the Plaintiff having put up a bill to let the apartment, will not prevent his recovering. *Redpath* v. *Roberts.* *Page* 225

Usury.

If a party, who is liable on bills of exchange, or other securities, upon which usurious interest has been taken, on being called upon for payment of the bills or securities by a *bona fide* holder, and agrees to give a bond for the amount of these bills or securities, it is a good and legal security; and the obligor cannot set up the usury as a defence to an action on the bond. *Cuthbert* v. *Haley.* 22

Aliter, of a *particeps criminis*, who holds bills or notes usuriously taken; he cannot by the substitution of another security recover the amount of the bills or notes. *ib.*

If a Defendant undertakes to pay the Plaintiff the difference between taxed costs and costs out of pocket, in consideration of the Plaintiff's giving him time for payment of a debt recovered and the costs, is not usury. *Barnet* v. *Stone.* 209

Vide *Pars* v. *Eliason*, title *Bankrupt.*

W.

Warrant.

If officers act under a warrant, an action cannot be maintained against them for any act done in the execution of such warrant, without a previous demand of it, whether the warrant be legal or illegal. *Price* v. *Messenger.* *Page* 96

The general authority given by the appointment of constables and surveyors to the *Shadwell* police-office, they cannot take a person into custody without a special warrant. *Rex* v. *Lawson* and others. 262

Vide *Excise-Officer.*

Warranty.

If a ship be warranted to sail with convoy from the place of rendezvous, she must receive her sailing orders at that place, or the warranty is not complied with. *Anderson* v. *Pitcher.* 124

It is no defence to an action for the price of an horse, that the warranty was untrue, if the Defendant was apprized of the defect shortly after the sale, and did not return him, but by the application of medicines or otherwise, has lessened the value of the horse from what it was at the time of sale. *Curtis* v. *Hannay.* 82

Will.

Where a will is contested between the heir at law and a stranger, the execution of it must be proved by the most clear and unequivocal evidence: but, if con-

contested at the end of some years, when the subscribing witnesses are dead, evidence may be called to their character. *Doe* e. d. *Walker* v. *Stephenson.* *Page* 284

Witness.

In a joint action against two, one of whom pleads bankruptcy, that shall not make him a witness for the other. *Raven* v. *Dunning.* 25

Where a cause has been referred, and the arbitrator on inspection of the Plaintiff's books and his evidence, finds that he has no cause of action, the arbitrator cannot be called as a witness to prove these facts in an action for malicious prosecution. *Habershon* v. *Troby.* 38

But an arbitrator may be called as a witness to prove facts admitted before him as arbitrator. *Gregory* v. *Heward.* 113

A journeyman by whom goods have been delivered, may be called as a witness to prove the delivery without a release, unless it has been customary to pay him for the goods. *Adams* v. *Davis.* 48

A party in prison, on a charge of forgery of a bill of exchange, is an admissible witness to prove payment of it, on an action brought to recover the amount. *Barber* v. *Gingell.* P. 62

A party entitled to a share of the penalty given by 21 *Geo.* III. chap. 37, may be a witness, on an indictment under the statute. *Rex* v. *Teasdale.* 68

A witness may use a book written by himself, but not from original documents, to enable him to state the time when such entries were made; but not so as to make the entries evidence. *Rodgers* v. *McCarthy.* 108

In an action for giving a false character, whereby the Plaintiff has lost the value of his goods, the person recommended having been a bankrupt, a creditor of the bankrupt is a good witness to prove the Plaintiff's case. *Burton* v. *Loyd.* 207

It is not absolutely necessary that a subscribing witness to a deed should see him sign it. *Park* v. *Mears.* 170

A parishioner of the parish in which the offence was committed in an action on the game-laws, is a good witness to prove it. *Clarke* v. *Taylor.* 214

Vide *Evidence.*

ADDENDUM ET ERRATA.

Page 22, in margin, for *obligee* read *obligor*
34, ——— dele *to maintain*
95, ——— for *if it appear*, read *it must appear*; and after *out of it*, read *or* the justification.
161, ——— for *six arrears* read *six annas.*

END OF VOL. III.

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